DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1038
Title: United States, Petitioner
v.
John Dennis Apel
Docketed: February 22, 2013
Linked with 12A610
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (11-50003, 11-50004, 11-50005)
Decision Date: April 25, 2012
Rehearing Denied: September 27, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 13 2012	Application (12A610) to extend the time to file a petition for a writ of certiorari from December 26, 2012 to January 25, 2013, submitted to Justice Kennedy.
Dec 19 2012	Application (12A610) granted by Justice Kennedy extending the time to file until January 25, 2013.
Jan 14 2013	Application (12A610) to extend further the time to file a petition for a writ of certiorari from January 25, 2013 to February 24, 2013, submitted to Justice Kennedy.
Jan 16 2013	Application (12A610) granted by Justice Kennedy extending the time to file until February 24, 2013.
Feb 22 2013	Petition for a writ of certiorari filed. (Response due March 25, 2013)
Mar 18 2013	Waiver of right of respondent John Dennis Apel to respond filed.
Mar 27 2013	DISTRIBUTED for Conference of April 12, 2013.
Mar 29 2013	Response Requested . (Due April 29, 2013)
Apr 29 2013	Brief of respondent John Dennis Apel in opposition filed.
May 9 2013	Reply of petitioner United States filed.
May 14 2013	DISTRIBUTED for Conference of May 30, 2013.
Jun 3 2013	Petition GRANTED.
Jul 3 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 25, 2013.
Jul 3 2013	The time to file respondent's brief on the merits is extended to and including September 9, 2013.
Jul 16 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 22 2013	The time to file the joint appendix and petitioner's brief on the merits is further

	extended to and including August 16, 2013.
Jul 22 2013	The time to file respondent's brief on the merits is further extended to and including October 21, 2013.
Jul 23 2013	Consent to the filing of amicus curiae briefs, in support of either or of neither party, received from counsel for the respondent.
Aug 16 2013	Joint appendix filed.
Aug 16 2013	Brief of petitioner United States filed.
Sep 17 2013	SET FOR ARGUMENT ON Wednesday December 4, 2013
Sep 17 2013	CIRCULATED
Sep 18 2013	Record from U.S.C.A. for 9th Circuit is electronic.
Sep 18 2013	Record from U.S.D.C. for Central District of California is electronic.
Oct 21 2013	Brief of respondent John Dennis Apel filed. (Distributed)
Oct 28 2013	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed. (Distributed)
Oct 28 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Oct 28 2013	Brief amicus curiae of Ground Zero Center for Nonviolent Action filed. (Distributed)
Oct 28 2013	Brief amicus curiae of Nuclear Age Peace Foundation filed. (Distributed)
Oct 28 2013	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Nov 20 2013	Reply of petitioner United States filed. (Distributed)
Dec 4 2013	Argued. For petitioner: Benjamin J. Horwich, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Erwin Chemerinsky, Irvine, Cal.

PETITION FOR WRIT OF CERTIORARI

12-1038

No.

FILED
FEB 22 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 1382, which prohibits a person from reentering a military installation after a commanding officer has ordered him not to reenter, may be enforced on a portion of a military installation that is subject to a public roadway easement.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 676 F.3d 1202. The order of the district court (App., *infra*, 5a-15a) is not reported. A previous opinion of the court of appeals in a case presenting the same issue (App., *infra*, 16a-24a) is reported at 651 F.3d 1180.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2012. A petition for rehearing was denied on September 27, 2012 (App., *infra*, 3a-4a). On December 19, 2012, Justice Kennedy extended the time within

which to file a petition for a writ of certiorari to and including January 25, 2013. On January 16, 2013, Justice Kennedy further extended the time to February 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1382 of Title 18 states:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined under this title or imprisoned not more than six months, or both.

STATEMENT

1. Vandenberg Air Force Base (Vandenberg or Base) is located in a rural area on the coast of central California, approximately 170 miles northwest of Los Angeles. Vandenberg is the site of sensitive missile- and space-launch facilities, and in part for that reason it is generally closed to the public. The Base, however, is crossed by two state roads—Highway 1 and Highway 246—that are open to the public for vehicular travel. Highway 1 runs across the eastern side of the Base and provides the most direct route between the closest town to the north (Santa Maria) and the closest town to the south (Lompoc). Otherwise, travelers must drive through or

around the Santa Ynez Mountains. Highway 246 runs across the southern side of the Base, and it allows travelers to reach a beach and train station on Vandenberg's western edge. See C.A. E.R. 56, 62; see also Gov't C.A. Br. 4-5.

The Department of the Air Force (Air Force) owns the land crossed by Highways 1 and 246, but it has granted roadway easements to the State of California and Santa Barbara County. See App., *infra*, 7a, 23a-24a; C.A. E.R. 45, 65. Such easements are common on military bases. See *United States* v. *Albertini*, 472 U.S. 675, 698-699 (1985) (Stevens, J., dissenting) ("[H]ighways or other public easements often bisect military reservations."). In granting those easements, the Air Force retained jurisdiction over the roadways; it simply agreed to exercise concurrent jurisdiction with the State and County. See App., *infra*, 7a; C.A. E.R. 45, 203-204. For example, in the easement for Highway 1 (which is the roadway at issue in this case), the Air Force expressly provided that the roadway's "use and occupation * * * shall be subject to such rules and regulations as the [base commander] may prescribe from time to time in order to properly protect the interests of the United States." C.A. E.R. 65; see App., *infra*, 14a.

2. Highway 1 runs next to Vandenberg's main gate. Near that gate, the base commander has designated an area for public protesting. That designated area, which is part of the Base, also falls within the scope of the Highway 1 easement.[1] See C.A. E.R. 53, 57. Pursuant

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[1] The area was designated as a protest area following litigation in the late 1980s. That litigation resulted in a policy statement indicating that peaceful demonstrations would be allowed in the designated area but that restrictions could be placed on the area to maintain

to his authority over Vandenberg and the terms of the easement, the base commander has issued certain restrictions governing the protest area. One of those restrictions is that anyone barred from Vandenberg may not enter the Base for any reason, including to protest in the designated area. See *id.* at 59. Base rules explain that "[i]f you are currently barred from Vandenberg AFB, there is no exception to the barment permitting you to attend peaceful protest activity on Vandenberg AFB property." *Ibid.* The rules further explain that "[i]f you are barred and attend a protest or are otherwise found on base, you will be cited and detained for a trespass violation due to the non-adherence [with] the barment order." *Ibid.*

Respondent John Apel has twice been barred from Vandenberg, the first time in 2003 for trespassing and vandalism and the second time in 2007 for trespassing. See C.A. E.R. 62. Respondent does not challenge the validity of either barment order. See *id.* at 27, 256. The second barment order was still in effect in 2010, when respondent entered Vandenberg on three separate occasions (in January, March, and April) to protest in the designated area. On each occasion, respondent was reminded of the existing barment order, asked to leave Vandenberg, and given two to three minutes to do so. Each time, when he failed to leave, respondent was cited for a violation of 18 U.S.C. 1382, which makes it a misdemeanor to reenter a federal military installation "after having been * * * ordered not to reenter by any officer or person in command or charge thereof." Respondent was then escorted and released outside Van-

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safety or to prevent material interference with the Air Force's operation of Vandenberg. See App., *infra*, 7a-8a; C.A. E.R. 53.

denberg. See C.A. E.R. 101-102, 203-204, 219-220, 222, 225-227.

3. Respondent moved to dismiss all three counts on the ground that the First Amendment prevented enforcement of Section 1382 in the designated protest area. The magistrate judge denied that motion. App., *infra*, 7a. Respondent subsequently was convicted in two separate trials of the three offenses, and he was ordered to pay a total of $305 in fines and fees. *Ibid.* Respondent appealed his convictions to the district court on both statutory and constitutional grounds. As relevant here, he contended that Section 1382 applies only to property over which the United States has "absolute ownership" or an "exclusive right [of] possession." *Id.* at 9a (internal quotation marks omitted). Accordingly, respondent argued, the government could not enforce Section 1382 in the designated protest area, because the United States has only concurrent jurisdiction over that area as a result of the Highway 1 easement. See *id.* at 9a, 14a-15a.

The district court affirmed respondent's convictions. App., *infra*, 5a-15a. The court reasoned that the United States "has a sufficient possessory interest and exercises sufficient control over the designated protest area in order to sustain [respondent's] conviction[s] under 18 U.S.C. § 1382." *Id.* at 14a. The court explained that the United States "owns the land upon which [respondent] trespassed," and although "this ownership interest is subject to an easement, the terms of the easement provide that its use" is subject to base rules and regulations. *Ibid.* The court noted that, "consistent with its ownership and the scope of the easement, the Government exercises substantial control over the designated protest area, including, for example, patrolling the area

and creating and enforcing an extensive set of restrictions on its use." *Id.* at 14a-15a. Finally, the court rejected respondent's First Amendment argument, holding that the designated protest area is not a public forum but that in any event respondent's previous barment order was a valid basis for his exclusion. See *id.* at 11a-14a.

4. The court of appeals reversed in a per curiam opinion. App., *infra*, 1a-2a. The court held that, under its previous decision in *United States* v. *Parker*, 651 F.3d 1180 (2011), Section 1382 applies only to areas over which the federal government exercises an exclusive right of possession. See App., *infra*, 2a. "[B]ecause a stretch of highway running through Vandenberg AFB is subject to an easement," the court reasoned, "the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under [Section] 1382 cannot stand, regardless of an order barring a defendant from the base." *Ibid.* The court "question[ed] the correctness" of its earlier decision in *Parker*, but concluded that *Parker* was "binding" and "dispositive of th[e] appeal." *Ibid.* The court of appeals subsequently denied the government's petition for rehearing en banc, which one of the panel members recommended granting. See *id.* at 3a-4a.

REASONS FOR GRANTING THE PETITION

Section 1382 of Title 18 prohibits a person from reentering a military installation after having been ordered not to reenter by a commanding officer. By its terms, the statute requires only that the reentry be "within the jurisdiction of the United States," not that such jurisdiction be exclusive. In *United States* v. *Albertini*, 472 U.S. 675 (1985), this Court held that nothing in the statutory

text justified "engrafting onto [Section] 1382 a judicially defined time limit [for reentry]" or "limit[ing] [Section] 1382 to military bases where access is restricted." *Id.* at 682. Here, in conflict with *Albertini* as well as with decisions of the First, Second, and Sixth Circuits, the Ninth Circuit has engrafted onto Section 1382 a requirement of absolute ownership or exclusive possession nowhere to be found in the statute's text. Moreover, the court of appeals rested its decision on circuit precedent whose correctness it questioned, but the court twice declined to consider the issue en banc. Accordingly, absent this Court's review, the United States will be unable to fully enforce a significant federal criminal statute on many military bases throughout the Ninth Circuit.

A. The Decision Below Is Incorrect

1. a. Section 1382 of Title 18 of the United States Code prohibits two different types of conduct on federal military bases. The statute's first clause provides that "[w]hoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, * * * for any purpose prohibited by law or lawful regulation," is guilty of a misdemeanor and may be fined or imprisoned not more than six months. 18 U.S.C. 1382. The second clause—which is the one at issue in this case—provides that "[w]hoever reenters or is found within any such reservation, * * * after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof," is guilty of the same offense. When the statute's second clause prohibits reentry into "any such reservation," it means the type of reservation enumerated in the preceding clause, *i.e.*, a military installation where reentry is "*within the jurisdiction of the United States.*" *Ibid.* (emphasis added). So long as a defendant's reentry into

a military base is "within the jurisdiction of the United States," he is subject to punishment under Section 1382. The statute does not require that federal jurisdiction be exclusive, and it says nothing about ownership or possession (let alone exclusive ownership or possession).[2]

The federal government's grant of a roadway easement for Highway 1 across Vandenberg does not remove that area from federal jurisdiction. The easement simply grants the State of California and Santa Barbara County a right-of-way to allow traffic across the land, provided that federal law (including Section 1382) otherwise permits individuals to be there. The easement itself expressly provides that the roadway's "use and occupation * * * shall be subject to such rules and regulations as the [base commander] may prescribe from time to time in order to properly protect the interests of the United States." C.A. E.R. 65. The easement thus explicitly preserves the government's ability to apply base regulations to the area covered by the easement. But even if the easement were silent, it would not create an exception to otherwise applicable federal laws and regulations. The government commonly grants easements across military bases for public purposes, see *Albertini*, 472 U.S. at 698-699 (Stevens, J., dissenting),

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[2] Section 1382 is consistent with various provisions of Title 10 governing the armed forces generally. Those provisions define federal military installations as facilities "under the jurisdiction" of the Department of Defense. 10 U.S.C. 2687(e)(1) (Supp. V 2011). See, *e.g.*, 10 U.S.C. 2391(d)(1) (Supp. V 2011) and 2667(i)(3) (incorporating Section 2687's definition of "military installation"); see also 10 U.S.C. 2801(c)(4) (Supp. V 2011) (defining the term "military installation" in relevant part as "a base * * * under the jurisdiction of the Secretary of a military department"); cf. 10 U.S.C. 101(a)(6) (defining the term "department" as, *inter alia*, "installations * * * under the control or supervision of the Secretary of Defense").

and it does not thereby create a federal-law-free zone in which civilians may violate federal statutes with impunity.[3]

b. The exclusive-possession requirement originated in *United States* v. *Watson*, 80 F. Supp. 649 (E.D. Va. 1948), which held that "[t]o punish an infraction" of Section 1382 on property subject to an easement "proof of criminal jurisdiction of the [property] alone was not enough." *Id.* at 651. According to the *Watson* court, "[s]ole ownership or possession, as against the accused, had to be in the United States or there was no trespass." *Ibid.* But Section 1382 does not codify the common law of trespass. Rather, Section 1382 creates a distinct offense for unlawful reentry into military installations within federal jurisdiction. See *United States* v. *Mowat*, 582 F.2d 1194, 1203 (9th Cir.) ("Arguably, if any inference based on a comparison with the common law is appropriate, it is that Congress sought to divorce this statute from the requirements of common law trespass."), cert. denied, 439 U.S. 967 (1978). Even assum-

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[3] Numerous federal statutes, including criminal statutes, apply to persons or property "within the jurisdiction of the United States." See, *e.g.*, 42 U.S.C. 1981(a) (affording "[a]ll persons within the jurisdiction of the United States" equal rights "to make and enforce contracts, to sue, be parties, [and] give evidence"); 42 U.S.C. 1983 (permitting "any citizen of the United States or other person within the jurisdiction thereof" to seek relief for the deprivation of federally protected rights under color of state law); see also 18 U.S.C. 956(a)(1) and (b) (conspiracy to injure persons or property in a foreign country); 18 U.S.C. 981(a)(1)(B) (civil forfeiture of property related to certain offenses against foreign nations). Those statutes, like Section 1382, require the presence of federal jurisdiction, not the absence of concurrent state or local jurisdiction. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160, 172 (1976) (holding that 42 U.S.C. 1981 prohibits private schools from discriminating against applicants for admission on the basis of race).

ing that Section 1382 codifies the common law of trespass, it is undisputed that the United States owns the land crossed by the roadway easement, and that type of possessory interest is sufficient to maintain a trespass action at common law. See *United States* v. *McCoy*, 866 F.2d 826, 830 n.4 (6th Cir. 1989); *Porter* v. *City of L.A.*, 182 Cal. 515, 519 (1920).

2. The court of appeals applied its exclusive-possession requirement to reverse respondent's convictions in this case on the basis of its previous decision in *United States* v. *Parker*, 651 F.3d 1180 (2011). See App., *infra*, 2a; see also *id.* at 16a-24a (*Parker*). In *Parker*, the court of appeals held that Section 1382 "require[s] the government to prove its absolute ownership or exclusive right to the possession of the property upon which the violation occurred." *Id.* at 18a-19a. Applying that holding here, the court reasoned that because respondent's violation occurred in an area subject to a state roadway easement, "the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under [Section] 1382 cannot stand, regardless of an order barring a defendant from the base." *Id.* at 2a. The court "question[ed] the correctness" of its earlier decision in *Parker*, but concluded that *Parker* was "binding" and "dispositive of th[e] appeal." *Ibid.*

Parker itself, however, did not discuss the text of Section 1382, let alone address the lack of any textual support for an exclusive-possession requirement. Nor did *Parker* address "the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command," *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961), which is "[a] necessary concomitant of the basic function of a military in-

stallation," *Greer* v. *Spock*, 424 U.S. 828, 838 (1976).[4] Here, far from being summarily excluded from Vandenberg, respondent was barred from reentering the Base pursuant to an order whose validity he does not challenge. See C.A. E.R. 27, 62. Even then, on the three occasions that respondent unlawfully reentered, he was reminded of the barment order, asked to leave Vandenberg, and given two to three minutes to do so. Only when respondent failed to comply was he cited for violating Section 1382, and escorted and released outside Vandenberg. See *id.* at 101-102, 219, 222, 225-227. That exercise of the base commander's authority falls well within his "historically unquestioned power * * * to exclude civilians from the area of his command."[5]

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[4] As the *Parker* panel noted, see App., *infra*, 19a n.2, the United States Attorney's Manual states that Section 1382 applies to any military reservation "over which the United States has exclusive possession." U.S. Dep't of Justice, *U.S. Attorney's Manual, Title 9, Criminal Resource Manual* § 1634 (1997) (*Manual*). But the only authority that the *Manual* cites for that proposition, *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960), does not support it. The defendants in *Holdridge* contended that their convictions were invalid because the federal government lacked exclusive possession of the property on which they had trespassed. See *id.* at 306-307. The court of appeals rejected that argument on the ground that in fact the federal government did have exclusive possession. See *id.* at 308. The court therefore did not address whether exclusive possession is necessary. In any event, notwithstanding the *Manual*, the government has argued in this and other cases that Section 1382 does not require exclusive possession.

[5] Respondent's alternative First Amendment basis for defending the judgment (which the district court rejected but the court of appeals did not reach) is foreclosed by this Court's precedents. The Court has held that "[a] military base * * * is ordinarily not a public forum for First Amendment purposes even if it is open to the public." *Albertini*, 472 U.S. at 684; see *Greer*, 424 U.S. at 838. Even as-

B. The Decision Below Is In Conflict With Decisions Of This Court And Other Courts Of Appeals

1. The decision below is directly at odds with this Court's decision in *Albertini*. In *Albertini*, the defendant attended an open house at a military base years after having been barred from reentering that base, for which he was convicted of violating Section 1382. See 472 U.S. at 677. This Court rejected the defendant's First Amendment challenge to his conviction, see *id.* at 684-690, but it first rejected his arguments that Section 1382 did not apply to his conduct. The Court reasoned that "nothing in the statute or its history supports the assertion that [Section] 1382 applies only to reentry that occurs within some 'reasonable' period of time." *Id.* at 682. Similarly, the Court dismissed as irrelevant the fact that the defendant in *Albertini* had been attending an open house, because "[t]he language of the statute does not limit [Section] 1382 to military bases where access is restricted." *Ibid.*

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suming that the designated protest area qualifies as a limited public forum, this Court held in *Albertini* that "Section 1382 is content-neutral and serves a significant [g]overnment interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security." 472 U.S. at 687; see *ibid.* ("The fact that respondent had previously received a valid bar letter distinguished him from the general public and provided a reasonable ground for excluding him from the base."). Respondent does not challenge the validity of his 2007 barment order, see C.A. E.R. 27, 256, which was still in effect in 2010 when respondent committed the three offenses at issue in this case. Respondent's previous barment order thus provides a permissible, content-neutral basis for his exclusion from the base. See *Albertini*, 472 U.S. at 689. In any event, respondent's case-specific constitutional claim provides no reason to leave unreviewed the court of appeals' incorrect statutory holding.

As the Court explained in *Albertini*, the plain language of Section 1382 "makes it unlawful for a person to reenter a military base after having been ordered not to do so by the commanding officer." 472 U.S. at 680. And just as in *Albertini*, "[u]nless the statutory language is to be emptied of its ordinary meaning, respondent violated the terms of [Section] 1382 when he reentered [Vandenberg] in [2010] contrary to the bar letter." *Ibid.* Indeed, this case is even starker than *Albertini*, because here the court of appeals did not merely read into the statute a requirement that it does not contain (*i.e.*, a requirement of exclusive ownership or possession). Rather, to accomplish that, the court of appeals effectively had to ignore a requirement that the statute *does* contain: namely, that a defendant's illegal reentry be "within the jurisdiction of the United States." Congress was not silent on Section 1382's scope. It applies whenever the defendant's reentry is within federal jurisdiction, without regard to concurrent state or local jurisdiction.

2. The decision below is also in conflict with decisions of other courts of appeals. In *McCoy*, *supra*, as in this case and in *Parker*, the defendant was cited for violating Section 1382 in an area of a military base subject to a roadway easement. See 866 F.2d at 828-829. The Sixth Circuit reasoned that the government did not have to show exclusive possession of the property on which the violation had occurred. See *id.* at 830-831 & n.4. Rather, the court held, the government had to show only "a possessory interest" in the property at issue. *Id.* at 830. Thus, even if the United States did not own that property, "[the property] would still have been part of a military installation possessed and operated by the United States—and it would still have been off-limits to anyone barred from the base under [Section] 1382." *Ibid.* Ap-

plying that approach here, respondent's convictions in this case are valid under Section 1382, because it is undisputed that the United States owns the property on which respondent's violations occurred.

The Sixth Circuit has since reaffirmed its decision in *McCoy*. See *United States* v. *LaValley*, 957 F.2d 1309, 1313 ("The mere fact that an easement had been granted to the state for the construction, maintenance and use of highway F-41 did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred."), cert. denied, 506 U.S. 972 (1992). The First and Second Circuits also have relied on *McCoy* in holding that Section 1382 "requires only that the government demonstrate either a possessory interest in, or occupation or control of, the area reserved by the military." *United States* v. *Ventura-Meléndez*, 275 F.3d 9, 17 (1st Cir. 2001); see *United States* v. *Allen*, 924 F.2d 29, 31 (2d Cir. 1991) (per curiam) (holding that Section 1382 applies to, *inter alia*, "property over which the United States Navy exercises dominion and control and from which it may exclude the general public"); *ibid.* ("Government ownership of the property in question is not a requisite to violating Section 1382."). Accordingly, on the approach taken by three other courts of appeals, respondent's convictions in this case would be upheld.

C. The Decision Below Is Settled Circuit Law That Threatens Substantial Harm To The Safe And Orderly Operation Of Many Of This Nation's Military Installations

1. Section 1382 is an important tool for base commanders in maintaining the safety and integrity of their facilities, because civilians may be prevented from entering or reentering those facilities for a host of legitimate reasons. For instance, respondent here vandalized Vandenberg on a previous occasion (by throwing blood

on a sign). See App., *infra*, 8a, 13a; C.A. E.R. 2, 62. The defendant in *Parker* threatened to shoot someone after his employment had been terminated. See Gov't C.A. Br. at 4, *Parker*, *supra* (No. 10-50248). The defendants in *Allen* climbed onto a moored nuclear submarine and hammered on its hull, see 924 F.2d at 30, and the defendants in *Ventura-Meléndez* trespassed near a live-impact zone used for live-fire artillery and bombardment exercises, see 275 F.3d at 12, 17-18. In these and many other circumstances, Section 1382 provides a means for base commanders to remove and sanction civilians who refuse to comply with base rules and regulations.

The decision below thus threatens substantial harm to the safe and orderly operation of military bases in the Ninth Circuit, because many of those bases are subject to easements for public roadways or utilities. See, *e.g.*, *Albertini*, 472 U.S. at 698-699 (Stevens, J., dissenting) ("[H]ighways or other public easements often bisect military reservations."); *Higginson* v. *United States*, 384 F.2d 504, 507 (6th Cir. 1967). According to the Department of Defense, at least 36 major military bases in the Ninth Circuit contain roadway easements. See 11-50003 Docket entry No. 37, at 24 (9th Cir. June 25, 2012). Those easements present a far more serious security threat than the open house at issue in *Albertini*: they are generally permanent and not easily monitored. In any area covered by such an easement, base commanders will be unable to use Section 1382 to exclude civilians, even if those civilians have been validly barred from reentering the facilities. Beyond the fact that base commanders should not have to wait and see whether proven violators will offend again, easements may run near sensitive areas of military installations—*i.e.*, areas

where the ready ability to exclude civilians, particularly those subject to existing and valid barment orders, is of paramount importance. Cf. *United States* v. *Komisaruk*, 885 F.2d 490, 491 (9th Cir. 1989) (defendant entered Vandenberg and vandalized a space shuttle navigational system).

2. The decision below also will impose significant costs on the public. On the court of appeals' approach, base commanders must choose between "clos[ing] access to civilian traffic," thereby "causing substantial inconvenience to civilian residents," or "continu[ing] to accommodate the convenience of the residents, but only at the cost of surrendering the authority Congress conferred upon [them]" under Section 1382. *Flower* v. *United States*, 407 U.S. 197, 201 (1972) (Rehnquist, J., dissenting). Faced with that choice, some base commanders are likely to restrict access to civilian traffic, and at the least commanders will be far more reticent to grant easements and rights-of-way for the public benefit. If the decision below is permitted to stand, the United States will run the undue risk in granting future easements and maintaining existing ones that it will be compelled to surrender its enforcement authority under Section 1382.

3. Those harms to the public and this Nation's armed forces are now virtually certain without this Court's review. The court of appeals' previous decision in *Parker*—which was the basis for the court's decision in this case—rested on circuit precedent. App., *infra*, 18a-22a. According to the *Parker* panel, "[t]he law of the circuit" required "that the government prove absolute ownership or exclusive right of possession." *Id.* at 22a. The government argued that those older circuit cases were not controlling, because the parties either had assumed

or stipulated to the federal government's exclusive control. The government pointed out that not since *Watson* in 1948 had a court reversed a Section 1382 conviction on the basis of the exclusive-possession requirement. In the view of the *Parker* panel, however, the court's previous cases had "reaffirmed and applied" the exclusive-possession requirement. *Ibid.* Moreover, the *Parker* panel rejected the government's argument that any such requirement in previous cases had been undermined by this Court's intervening decision in *Albertini*. See *id.* at 23a. The panel in *Parker* thus squarely concluded that an exclusive-possession requirement is settled circuit law that may be overturned only by the en banc court. See *id.* at 22a.

The decision in *Parker* initially was unpublished and nonprecedential, and the government did not seek rehearing en banc in that case. After the time for filing a rehearing petition had passed, the court of appeals published its decision in *Parker*. Although normally that would have reset the deadline for a rehearing petition, see 9th Cir. R. 40-2, the court's publication order provided that "[n]o new petition for rehearing or rehearing en banc [would] be entertained." 10-50248 Docket entry No. 32, at 1 (9th Cir. Aug. 22, 2011). In light of *Parker*, the government requested initial hearing en banc in this case, but the court denied that request. See 11-50003 Docket entry No. 27 (Mar. 28, 2012). After the panel in this case issued its opinion relying on *Parker* but expressly "question[ing] the correctness" of that decision, the government again requested en banc review; the court again denied that request (although one of the panel members recommended granting it). See App., *infra*, 2a, 4a. Thus, although the decision below itself questioned the validity of the exclusive-possession re-

quirement, it is unlikely that the government will be able to challenge that requirement absent this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 11-50003, 11-50004, 11-50005

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

Argued and Submitted April 13, 2002
Filed April 25, 2012

OPINION

Before: BARRY G. SILVERMAN and JOHNNIE B. RAWLINSON, Circuit Judges, and JOHN R. TUNHEIM, District Judge.*

PER CURIAM:

Appellant John Apel, who was subject to a pre-existing order barring him from Vandenberg Air Force Base, was convicted of three counts of trespassing on the base in violation of 18 U.S.C. § 1382. After his convictions became final in district court, we decided *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011). *Parker* held that because a stretch of highway running through Vandenberg AFB is subject to an easement "granted to the State of California, which later relinquished it to the County of Santa Barbara," the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under 18 U.S.C. § 1382 cannot stand, regardless of an order barring a defendant from the base. 651 F.3d at 1184.

Although we question the correctness of *Parker*, it is binding, dispositive of this appeal, and requires that Apel's convictions be REVERSED.

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* The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-50003
D.C. No. 2:10-cr-00830-JFW-1

Central District of California, Los Angeles

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

No. 11-50004
D.C. No. 2:10-cr-00869-JFW-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

No. 11-50005
D.C. No. 2:10-cr-00831-JFW-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

[Sept. 27, 2012]

ORDER

Before: SILVERMAN and RAWLINSON, Circuit Judges, and TUNHEIM, District Judge.*

Judges Silverman and Rawlinson voted to deny the petition for rehearing en banc, and Judge Tunheim recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

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* The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. **CR 10-830-JFW,**
CR 10-831-JFW,
CR 10-869-JFW;
CVB Nos.: 1981283-RCF, 2576253-RCF,
1982007-RCF

UNITED STATES OF AMERICA

v.

JOHN DENNIS APEL

Dated: Dec. 28, 2010

CRIMINAL MINUTES

PRESENT: HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly Courtroom Deputy	None Present Court Reporter	Sharon McCaslin Asst. U.S. Attorney Not Present

PROCEEDINGS (IN CHAMBERS): ORDER AFFIRMING JOHN DENNIS APEL'S CONVICTIONS AND SENTENCE

On July 15, 2010, after two separate trials before Magistrate Judge Rita Coyne Federman, Appellant John Dennis Apel ("Mr. Apel") was convicted of trespass in violation of 18 U.S.C. § 1382, for entering Vandenberg Air Force Base ("VAFB") after having been formally ordered not to reenter the base by the VAFB Commander. On July 28, 2010, Mr. Apel filed a timely Notice of Appeal of his convictions and sentence. The Court set a briefing schedule, and on October 1, 2010, Mr. Apel filed his Opening Brief. On October 25, 2010, the Government filed its Answering Brief, and on November 4, 2010, Mr. Apel filed his Reply. The Court considered the issues fully briefed, and found that this matter was appropriate for decision without oral argument. The matter was, therefore, removed from the Court's November 15, 2010 hearing calendar and the parties were given advance notice. However, the Court was concerned about the adequacy of the record on appeal, and on November 15, 2010 issued an Order Requiring Parties to File Transcripts and Excerpts of the Record. Mr. Apel complied with the Court's Order, and filed the relevant transcripts and excerpts of the record.

Accordingly, after considering the Opening, Answering, and Reply Briefs and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

On July 15, 2010, Mr. Apel was convicted in two separate trials of three charges of trespass in violation of 18 U.S.C. § 1382, for entering VAFB after having been formally ordered not to reenter the base by the VAFB Commander. The magistrate judge sentenced defendant to pay a total of $250 in fines, $30 in special assessment fees, and $25 in processing fees. Prior to the trials resulting in his convictions, Mr. Apel moved to dismiss the charges against him on First Amendment grounds. On July 21, 2010, the magistrate judge issued a written order denying the motion to dismiss. The evidence presented at trial, and on the motion to dismiss, demonstrates the following undisputed facts:

VAFB is a "closed base." Non-military and non-Department of Defense personnel are not permitted to enter the base without express permission of the Commander at VAFB. However, VAFB officials have granted a roadway easement to the State of California and the County of Santa Barbara to construct, use, and maintain Highway 1 for purposes of a right of way. VAFB, the State, and the County exercise concurrent jurisdiction over the right of way.

In 1989, as part of a stipulation for settlement in *Fahrner v. Oliverio*, CV 88-5627-AWT(Bx), the VAFB Commander adopted a policy statement authorizing peaceful protests to take place on VAFB property within a designated protest area, located within the area subject to the concurrent jurisdiction of VAFB,

the State, and the County. The policy statement provides, in relevant part: "Protest demonstrations may be curtailed in this area when they materially interfere with or have a significant impact on the conduct of the military mission of the U.S. Air Force." In addition, the VAFB "Protest Advisory," available on the VAFB website, sets forth a lengthy list of rules governing the conduct of protest activities within the designated protest area. Among other things, it requires protests to be scheduled and coordinated at least two weeks in advance with the VAFB Public Affairs office and Security Forces. Protestors are barred from erecting structures or equipment in the protest area, from soliciting or distributing materials, and from having weapons, skates, bicycles, or containers larger than one foot square. The Protest Advisory specifically provides that persons barred from VAFB are not permitted to attend peaceful protests.

On January 31, 2010, March 3, 2010, and April 7, 2010, Defendant Apel participated in peaceful protests at VAFB within the designated protest area on VAFB property. On the three dates in question, Mr. Apel was charged with trespass in violation of 18 U.S.C. § 1382, for entering VAFB after having been ordered not to reenter the base. Prior to Mr. Apel's participation in these peaceful protests, the VAFB Commander had issued a "bar letter" to Mr. Apel, barring Mr. Apel from entering the base because he had previously trespassed onto VAFB property and vandalized VAFB property by throwing blood on the VAFB sign.

On this appeal, Mr. Apel argues that the Court should reverse his convictions on the grounds that (1) the magistrate judge erred in finding that the designated protest area was not a traditional public forum or designated public forum, and (2) the government does not have "absolute ownership" or "exclusive right to the possession" of the property upon which the violation occurred, as is necessary for a violation of 18 U.S.C. § 1382.

II. Legal Standard

This Court reviews a judgment of conviction by a magistrate judge using the same standard applied by a court of appeal to the judgment of a district court. *See* Fed. R. Crim. P. 58(g)(2)(D). Questions regarding the existence or nonexistence of a public forum are mixed questions of law and fact implicating constitutional rights, and are thus reviewed *de novo*. *Trenouth v. United States*, 764 F.2d 1305, 1307 (9th Cir. 1985). "Where, as here, the key issues arise under the First Amendment, [the Court] also conduct[s] an independent review of the facts." *See Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (quotations, alterations, and citations omitted).

"Claims of insufficient evidence are [also] reviewed *de novo*." *United States v. Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007). If, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the evidence is sufficient to support a conviction. *Jack-*

son v. Virginia, 443 U.S. 307, 319 (1979). As the Ninth Circuit explained:

> [T]his deferential standard of review protects the trier of fact's responsibilities to resolve conflicting testimony, weigh the evidence, and draw reasonable inferences from the evidence presented. A reviewing court need not ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Rather the reviewing court must respect the province of the trier of fact by considering all evidence in the light most favorable to the prosecution and drawing all reasonable inferences in favor of the prosecution. Finally, a reviewing court faced with a record of historical facts that supports conflicting inferences must presume—even if does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution.

Stanton, 501 F.3d at 1099 (internal quotations and citations omitted).

The Court may "affirm on any ground supported by the record even if it differs from the rationale" of the magistrate judge. *See United States v. Cortez-Arias*, 403 F.3d 1111, 1114 n.7 (9th Cir. 2005) (quotations and citations omitted).

III. Discussion

Mr. Apel argues that the magistrate judge erred in finding that the designated protest area at VAFB was not a traditional public forum or designated public

forum. After conducting a *de novo* review and an independent review of the facts, the Court agrees with the findings, reasoning, and conclusion of the magistrate judge and affirms Mr. Apel's conviction. Specifically, the Court concludes that the designated protest area at VAFB is not a traditional or designated public forum, and that the restrictions on access to that designated protest area are reasonable. However, the Court also affirms Mr. Apel's convictions on an alternate ground. Regardless of whether or not the designated protest area at VAFB is a public forum, the Court concludes that Mr. Apel's First Amendment rights were not violated by his exclusion from the designated protest area because he had been validly barred from entering VAFB.

In *Flower v. United States*, 407 U.S. 197 (1976), the key case relied upon by Mr. Apel, the Supreme Court summarily reversed a conviction under § 1382 of a civilian who entered a military reservation after receiving a bar letter, which he received for participating in an attempt to distribute unauthorized publications on the open military base. At the time of his arrest, the civilian was "quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston." *Id.* at 197. There was no sentry post or guard anywhere along the street, and unrestricted civilian traffic flowed through the street 24 hours per day. The Supreme Court determined that New Braunfels Avenue was a public thoroughfare "no different than other streets in the city" and that "[u]nder such circumstances the military has abandoned any

claim that it has special interests in who walks, talks or distributes leaflets on the avenue." *United States v. Albertini*, 472 U.S. 675, 684 (1985) (describing holding in *Flower*); *Flower*, 506 U.S. at 198.

The scope of *Flower* has since been clarified by subsequent Supreme Court decisions. In *United States v. Albertini*, 472 U.S. 675 (1985), the Supreme Court concluded that the defendant could be convicted of violating 18 U.S.C. § 1382, where he peacefully demonstrated at an open house at a military base after he had been barred from reentering the base. In distinguishing *Flower*, the Supreme Court explained:

> *Flower* cannot plausibly be read to hold that regardless of the events leading to issuance of a bar letter, a person may not subsequently be excluded from a military facility that is temporarily open to the public. Instead, *Flower* establishes that where a portion of a military base constitutes a public forum because the military has abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression, a person may not be excluded from that area on the basis of activity that is itself protected by the First Amendment. Properly construed, *Flower* is simply inapplicable to this case. There is no suggestion that respondent's acts of vandalism in 1972, which resulted in the issuance of the bar letter, were activities protected by the First Amendment. . . . Respondent was prosecuted not for demonstrating at the open house, but for reentering the base after he had been ordered not to do so.

Id. at 685-86 (internal citations omitted). The Supreme Court went on to hold "[w]hether or not [the base] constituted a public forum on the day of the open house, the exclusion of respondent did not violate the First Amendment." *Id.* at 687. The Court concluded that 18 U.S.C. § 1382 is content-neutral, "serves a significant government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security," and that the incidental restriction on alleged First Amendment freedoms was no greater than was essential to the furtherance of that interest.

Likewise, the Court here concludes that, whether or not the designated protest area at Vandenberg Air Force Base is a public forum, the military may properly exclude recipients of valid bar letters, such as Mr. Apel, without violating the First Amendment. Mr. Apel was barred from VAFB because he trespassed onto VAFB property and vandalized VAFB property by throwing blood on the VAFB sign. There is no evidence that Mr. Apel's prior acts of trespassing and vandalism were activities protected by the First Amendment. Mr. Apel was prosecuted under 18 U.S.C. § 1382, not for participating in protests at VAFB, but for reentering VAFB after he had been validly ordered not to do so. Accordingly, as the Supreme Court held in *Albertini*, the Court concludes that Mr. Apel's conviction under 18 U.S.C. § 1382 does not violate the First Amendment. *See Albertini*, 472 U.S. at 689 ("Nothing in the First Amendment requires military commanders to wait until persons

subject to a valid bar order have entered a military base to see if they will conduct themselves properly. . . ."); *see also United States v. Walsh*, 770 F.2d 1490, (9th Cir. 1985) ("*Albertini* indicates that whether or not a base is a public forum, the military may exclude recipients of bar letters without violating the First Amendment.").

Finally, after viewing the evidence in the light most favorable to the prosecution, the Court concludes that the Government has a sufficient possessory interest and exercises sufficient control over the designated protest area in order to sustain Mr. Apel's conviction under 18 U.S.C. § 1382. *See United States v. Vasarajs*, 908 F.2d 443, 447 (9th Cir. 1990) ("[T]here appears to be some authority for the proposition that the government must exercise control over its property in order to preserve the right to exclude others from it pursuant to § 1382."); *United States v. Ventura-Meléndez*, 275 F.3d 9, 17 (1st Cir. 2001) ("[W]e hold that, when the government does not own the land, § 1382 requires only that the government demonstrate either a possessory interest in, or occupation or control of, the area reserved by the military."). It is undisputed that the Government owns the land upon which Mr. Apel trespassed. Although this ownership interest is subject to an easement, the terms of the easement provide that its use is "subject to the rules and regulations as [the Government] . . . may prescribe . . . to properly protect the interest of the United States." Moreover, consistent with its ownership and the scope of the easement, the Government

exercises substantial control over the designated protest area, including, for example, patrolling the area and creating and enforcing an extensive set of restrictions on its use.

IV. Conclusion

For the foregoing reasons, the Court **AFFIRMS** the convictions and sentence of Appellant John Dennis Apel, and the appeal is **DISMISSED.**

IT IS SO ORDERED.

* * * * *

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 10-50248 (Lead Case), 10-50250, 10-50251

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HOBERT PARKER, JR., DEFENDANT-APPELLANT

Argued and Submitted Mar. 11, 2011
Filed Aug. 22, 2011

OPINION

Before: BETTY B. FLETCHER, KIM MCLANE WARDLAW and BRETT M. KAVANAUGH,* Circuit Judges.

PER CURIAM:

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* The Honorable Brett M. Kavanaugh, Circuit Judge for the District of Columbia Circuit, sitting by designation.

Hobert Parker, Jr., appeals his misdemeanor convictions, after retrial, of three counts of violating 18 U.S.C. § 1382. He argues that his retrial violated the proscription against double jeopardy, that there was insufficient evidence to convict, and that his convictions violate his First Amendment rights. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse.

We address the insufficiency of the evidence argument first. *See Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 630 (9th Cir. 1982) (courts should not pass upon a constitutional question if there is a nonconstitutional ground upon which the case may be decided). We review de novo the sufficiency of the evidence to support the conviction. *United States v. Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007). There is sufficient evidence to support a conviction if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Parker's charges arose from his protest activities on Ocean Avenue, which is a public road that crosses the Vandenberg Air Force Base ("VAFB") in Santa Barbara County, California. On each of the three occasions charged, Parker was carrying signs of protest against VAFB military police along the shoulder of Ocean Avenue. Each time, Parker was advised by military officers that he was not permitted to protest on Ocean Avenue and that the VAFB Commander had designated a protest area outside the VAFB Main

Gate. Each time, Parker refused to leave or relocate. After the first two incidents, Parker was cited twice for violating section 1382 and the VAFB Commander issued a "barment" letter that barred Parker from entering VAFB for any reason for a period of three years. Several days later, Parker was cited for the third time.

Section 1382 provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined under this title or imprisoned not more than six months, or both.

18 U.S.C. § 1382.[1]

We have interpreted section 1382 to require the government to prove its absolute ownership or exclu-

---

[1] Parker was cited twice for violating the first paragraph of section 1382, and once—after the VAFB Commander issued the bar letter—for violating the second paragraph of section 1382. This distinction is irrelevant for the purposes of this appeal.

sive right to the possession of the property upon which the violation occurred. *See United States v. Vasarajs*, 908 F.2d 443, 446-47 (9th Cir. 1990) (the government must have control, in addition to "absolute ownership, or an exclusive right to the possession" of the property in question, to preserve the right to exclude others pursuant to section 1382); *United States v. Mowat*, 582 F.2d 1194, 1206 (9th Cir. 1978) (accepting, in light of precedent, the parties' stipulation that the government "was required to prove, as an element of the offense, absolute ownership or the exclusive right to the possession of the property upon which the violation occurred"), *cert. denied*, 439 U.S. 967, 99 S. Ct. 458, 58 L. Ed. 2d 426 (1978); *United States v. Douglass*, 579 F.2d 545, 547-48 (9th Cir. 1978) (holding that "[m]ere toleration of certain uses by the public designed for their convenience does not result in the loss of the right to exclusive use" and that the requisite "ownership and possession of the area to enable [the United States] to exclude the appellant" had been established); *United States v. Packard*, 236 F. Supp. 585, 586 (N.D. Cal. 1964) (holding that the government met its burden of establishing "absolute ownership, or an exclusive right to the possession, of the road"), *aff'd*, 339 F.2d 887 (9th Cir. 1964) (affirming "for the reasons stated in the opinion of the trial court.").[2]

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[2] Our position is consistent with that of several other courts and the U.S. Attorney's Manual. *See, e.g., United States v. Allen*, 924 F.2d 29, 31 (2d Cir. 1991) ("[A] naval reservation includes

The government acknowledges our section 1382 authority, but challenges its precedential value. The government argues that the *Mowat* parties stipulated that section 1382 requires "absolute ownership or exclusive right of possession," *Mowat*, 582 F.2d at 1206, and contends that subsequent cases merely assumed, without squarely deciding, the same.

The government is mistaken. While the parties in *Mowat* indeed stipulated that section 1382 requires that the government prove "absolute ownership or exclusive right of possession," we did not blindly accept that stipulation, but did so in light of Ninth and Eighth Circuit precedent. *See id.* (citing *Packard* and *Holdridge*). Moreover, at the same time *Mowat*

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(1) property owned by the United States Navy and (2) property over which the United States Navy exercises dominion and control and from which it may exclude the general public.") (citing *Mowat*); *Holdridge v. United States*, 282 F.2d 302, 306-08 (8th Cir. 1960) (holding that "exclusive possession of the premises in the government has been appropriately established" where public use of roads traversing military base was extinguished in condemnation proceeding); U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 1634 (2010) (citing *Holdridge* for the proposition that Section 1382 "applies to any military, naval, or coast guard reservation, post, fort, arsenal, yard, station or installation over which the United States has exclusive possession."). *But see United States v. McCoy*, 866 F.2d 826, 830 n.4 (6th Cir. 1989) (rejecting *Mowat* and holding that "if proceedings under 18 U.S.C. § 1382 are comparable to trespass actions, centuries of legal history support the government's refusal to concede that anything more than a possessory interest had to be shown").

was decided, a different panel of this court independently held that section 1382 requires ownership or exclusive right of possession. *See Douglass*, 579 F.2d at 547-48 (citing *Packard*, *United States v. Holmes*, 414 F. Supp. 831 (D. Md. 1976) and *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948)). Subsequent panels have also held so independently of *Mowat*. *See Vasarajs*, 908 F.2d at 446 (citing *Holmes* and *Watson*).

The government further argues that our cases left open the question of what kind of government control over an area within a military base is insufficient for a section 1382 prosecution, as they all upheld section 1382 convictions and did not, in fact, involve an easement. The lack of an easement, however, was an important part of the *Vasarajs* and *Douglass* panels' rationale in upholding the convictions. *See Vasarajs*, 908 F.2d at 446-47 (the government exercised actual control over area involved and defendant did not argue that either she or the public at large benefitted from an easement burdening the portion of roadway at issue, or that she or the public at large gained title to that portion of roadway through adverse possession or an implied dedication); *Douglass*, 579 F.2d at 547 (rejecting appellant's argument that the area at issue "was not a part of the base because the United States did not have the requisite ownership and possession of the area to enable it to exclude the appellant" where appellant has not challenged the title of the United States to the area, there was no easement residing in the public with respect to this area, arising either by

grant or by reservation, nor was there a relinquishment of control over the area by the base personnel).

In conclusion, our circuit's requirement that the government prove absolute ownership or exclusive right of possession does not rest on the parties' unverified stipulation in one isolated case, but has been reaffirmed and applied by multiple panels in light of authority from this and other courts. We must therefore follow this precedent as the law of the circuit, the government's arguments that it is incorrect or imprudent notwithstanding. Only the en banc court can overturn a prior panel precedent. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.") (internal quotations omitted); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court. . . . [A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court.").

The law of the circuit rule, of course, has an important exception: a panel may disagree with the

circuit precedent when intervening Supreme Court decisions have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The government cites *United States v. Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985), where the Supreme Court held that section 1382's bar against re-entry after a defendant had received a bar letter applies during an open house, as "a person may not claim immunity from [the bar letter's] prohibition on entry merely because the military has *temporarily* opened a military facility to the public." 472 U.S. at 687, 105 S. Ct. 2897 (emphasis added). *Albertini* did not address the scenario where a military base or area thereof is *permanently* open to the public by virtue of a public easement. *Albertini* and the line of Ninth Circuit cases requiring absolute ownership or exclusive right of possession are therefore not irreconcilable. *Cf. Vasarajs*, 908 F.2d at 447 (holding that *Albertini* supports the view that the government "must exercise control over its property in order to preserve the right to exclude others from it pursuant to § 1382").

In this case, the evidence conclusively shows that Ocean Avenue had been established pursuant to a public road easement that the United States had initially granted to the State of California, which later relinquished it to the County of Santa Barbara. The road is subject to the concurrent jurisdiction of the County of Santa Barbara and VAFB, with the county

exercising primary responsibility for the enforcement of criminal laws.

In all three incidents, Parker was within the physical limits of the public road easement corresponding to Ocean Avenue, a fact which the government does not challenge. Because the government does not have an exclusive right of possession over Ocean Avenue, under this court's precedent, Parker's presence and protest activities cannot constitute violations of section 1382.

The judgment of conviction is therefore VACATED.

REVERSED.

OPPOSITION BRIEF

RECCED
AND
BRIEFS

No. 12-1038

Supreme Court, U.S.
FILED
APR 29 2013
OFFICE OF THE CLERK

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DENNIS APEL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a person who was previously barred from a military base may be convicted under 18 U.S.C. § 1382 for peacefully protesting on a public road easement outside the enclosed military base.

2. Whether under the First Amendment a person who was previously barred from a military base may be convicted under 18 U.S.C. § 1382 for peacefully protesting on a public street outside the enclosed military base.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent John Dennis Apel respectfully opposes the government's petition for a writ of certiorari in this case.

STATEMENT OF FACTS

This case involves an individual who was convicted for speech activities that occurred on a public highway that was outside a military base. Vandenberg Air Force Base ("Vandenberg") is a closed military base whose legal limits embrace a public highway, Highway 1, also commonly known as the Pacific Coast Highway.[1] This particular portion of Highway 1 is used by the public to reach, among other places, the city of Lompoc, as well as Surf Beach, which also has an Amtrak station.[2] There is also a public middle school off the shoulder of Highway 1, directly across from Vandenberg's main gate entrance.[3]

Since 1962, the State of California and the County of Santa Barbara have held an easement over the portion of Highway 1 that overlaps Vandenberg, thus

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[1] C.A. E.R. 2, 8.

[2] C.A. E.R. 62.

[3] C.A. E.R. 8, 173.

reserving a right of way for the public.[4] The easement is under the concurrent jurisdiction of the State and County which, along with Vandenberg, have law enforcement authority in the area.[5] There are no gates or sentries to control entry onto the area of the easement.[6] Traffic flows freely in both directions on the easement (i.e., on Highway 1) and traffic lights are situated along the intersections.[7]

Within the easement is a designated area outside the main gate entrance of the base that Vandenberg has set aside for the conduct of peaceful protests, pursuant to a base policy which dates back to 1989.[8]

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[4] C.A. E.R. 8, 65-73.

[5] C.A. E.R. 8, 45, 166-67.

[6] C.A. E.R. 272.

[7] C.A. E.R. 54-55, 272.

[8] C.A. E.R. 2, 8, 50-53. That policy states in full:

> People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the Intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force Base, California. The Air Force is obligated to insure that peaceful protests do not result in unsafe vehicle and people congestion around the Main Gate. If necessary, restrictions may be placed on peaceful protesters who encumber the roadways or engage in activities which can result in unsafe conditions for themselves or others. Protest demonstrations may be curtailed in this area when they materially interfere with or have a significant impact on the conduct of the military mission of the U.S. Air Force.

(Continued on following page)

This "designated protest area" is bounded by Highway 1, Lompoc-Casmalia Road, and a painted green line across California Boulevard, which connects with Highway 1 and Lompoc-Casmalia Road to form the intersection at Vandenberg's main gate entrance.[9]

The painted green line on California Boulevard functions as a border separating the enclosed military base at Vandenberg from Highway 1.[10] It marks the point at which the easement ends and Vandenberg's exclusive jurisdiction begins.[11]

Within that exclusive jurisdiction, in an area immediately inside the green line, is a public bus stop serviced by the City of Santa Maria.[12] Just behind

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Vandenberg adopted this policy statement pursuant to a stipulated settlement in a 1989 litigation, *Fahrner*, CV 88-05627-AWT(Bx). C.A. E.R. 7, 50-53. Issuance of the policy statement was an express term of the settlement. C.A. E.R. 51 at ¶ 4. In exchange, the plaintiffs agreed to dismiss their suit. C.A. E.R. 51 at ¶ 6. The settlement was approved by Judge A. Wallace Tashima and filed upon his order. C.A. E.R. 52. Thus, the agreement was and remains judicially enforceable.

Apel stated at trial that he had been a regular visitor to the designated protest area at Vandenberg for fourteen years. C.A. E.R. 144.

[9] C.A. E.R. 7, 54, 57 at ¶ 1, 58, 272. Although Vandenberg's official statements on the designated protest area mention "temporary fencing" as one of the boundaries, it does not appear from the record that any such fencing was present on the three occasions Apel was cited.

[10] C.A. E.R. 7-8, 170-71, 261-62, 272.

[11] C.A. E.R. 7-8, 170-71, 261-62, 272.

[12] C.A. E.R. 8, 272.

that is a visitors' center that receives members of the public wishing to visit the base.[13] Still further, approximately 200 yards inside the green line, is a security checkpoint made up of a guard shack and barricade.[14] Past that checkpoint are the operational parts of the base.[15]

Outside the green line, on the side of the easement, is Highway 1.[16] All of the speech activity which gave rise to this case occurred here on Highway 1, a public road outside of the enclosed military base.[17] More specifically, it occurred in the designated protest area that comprised part of Highway 1.[18]

Apel was convicted of three counts of violating § 1382 of Title 18 for participating in peaceful demonstrations in this designated protest area after having been previously barred from the base for trespassing.[19] At all relevant times on the occasions charged, Apel was in the designated protest area along Highway 1 and thus within the area of the easement where California and Santa Barbara County exercise concurrent jurisdiction.[20]

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[13] C.A. E.R. 8, 171.

[14] C.A. E.R. 8, 272.

[15] C.A. E.R. 8, 272.

[16] C.A. E.R. 7-8.

[17] C.A. E.R. 8-9.

[18] C.A. E.R. 8-9.

[19] C.A. E.R. 1-2.

[20] C.A. E.R. 8-9.

On appeal, the Ninth Circuit reversed Apel's convictions, holding that Apel's presence within a public road easement precluded enforcement of § 1382.[21] In so holding, the court of appeals followed its recent decision in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), which precedent it determined to be "binding" and "dispositive of [the] appeal." *Apel*, 676 F.3d at 1203.[22] Subsequently the government petitioned the court for rehearing en banc. The petition was denied.[23] No circuit judge called for a vote to rehear the matter, although District Court Judge Tunheim, sitting by designation, did so.[24]

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS CORRECT.

The government's petition for certiorari is primarily concerned with error. It asserts the decision below was incorrect.[25] That, of course, is not a ground for review on a writ of certiorari. *See* Sup. Ct. R. 10

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[21] Gov't's Pet. 1a-2a.

[22] Gov't's Pet. 1a-2a. Having decided the case on statutory grounds, the court had no occasion to reach Apel's constitutional argument that the First Amendment protected his right to protest on Highway 1.

[23] Gov't's Pet. 3a-4a.

[24] Gov't's Pet. 3a-4a.

[25] Gov't's Pet. 7-11.

("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This case does not present issues warranting resolution by this Court.

A. Section 1382 Does Not Apply In Areas Where The Public, By Virtue Of An Easement, Has A Right To Be Present.

Nothing in the text or history of 18 U.S.C. § 1382 suggests it was intended to reach civilians peacefully conducting themselves on a public road. On the contrary, the evidence is that Congress contemplated reasonable limits on the application of § 1382 when it enacted the statute. The exclusive-possession requirement, which originated with *United States v. Watson*, 80 F.Supp. 649 (E.D.Va. 1948), provides that conviction under § 1382 is limited to instances in which the government has exclusive control of property.

Specifically, here, there is a painted green line across California Boulevard, adjacent to Highway 1 and the public road easement, which clearly separates the area within the exclusive control of the base. For all its discussion of the military's jurisdiction, the Petition for Certiorari makes no mention of the green boundary line separating the area of the easement from the exclusive jurisdiction of Vandenberg

Air Force Base.[26] Yet this line, which is visible to all, is crucial: to one side of the line is the easement and upon it, an open, uninterrupted stretch of the Pacific Coast Highway traveled by motorists, pedestrians, and commuters riding the local buses of the City of Santa Maria. To the other side of the line is the exclusive jurisdiction of Vandenberg Air Force Base, comprising its main gate entrance and an access road, California Boulevard, which continues 200 yards to a security checkpoint controlling entry into the secured part of the base. On the three occasions he was charged, Apel at all times had been on the easement side of the green line. He never crossed the line into Vandenberg's exclusive jurisdiction. He never set foot on property in Vandenberg's exclusive possession. Rather he stayed on Highway 1, within the area of the easement, where members of the public have a right to be. This is undisputed.

The government argues that for purposes of § 1382, any federal jurisdiction is sufficient.[27] The government is incorrect. Although there is federal jurisdiction, there is also an easement, and the easement is paramount under § 1382.

According to the government, "The easement simply grants the State of California and Santa Barbara County a right-of-way to allow traffic across the land, *provided that federal law (including Section*

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[26] Gov't's Pet. 7-10.

[27] Gov't's Pet. 7-8.

1382) otherwise permits individuals to be there."[28] That proviso has no source in law or fact.

In essence, the government's view of the easement is: "Individuals may use and occupy Highway 1 pursuant to the easement unless they have been barred, in which case the easement ceases to apply as to those individuals and any subsequent presence by such individuals on Highway 1 shall be punishable by fine or imprisonment pursuant to § 1382." The government misapprehends what it means to grant an easement, as well as what it means to hold one. An easement is not a courtesy. The holder of an easement has an interest in the burdened property and an affirmative right to use it for the purposes authorized. *See Lesnoi, Inc. v. United States*, 170 F.3d 1181, 1191 (9th Cir. 1999) ("It is well settled that an easement is an interest in real property."); Restatement (Third) of Property (Servitudes) § 1.2 (2000). While vested, that right cannot be revoked, qualified, or made newly subject to conditions predicate by the grantor at the grantor's leisure and discretion. *See* Restatement (Third) of Property (Servitudes) § 1.2 cmt. g (2000).

The government insists the mere presence of federal jurisdiction should be enough to enforce § 1382 on the easement, and that its "grant of a roadway easement for Highway 1 across Vandenberg

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[28] Gov't's Pet. 8 (emphasis added).

does not remove that area from federal jurisdiction."[29] However, as discussed, the easement is more than its geographic area. Within that area, the easement carries rights and entitlements. Federal jurisdiction may lie, but it lies concurrently with the rights of the easement-holding public. Thus, properly framed, the question is not whether the presence of federal jurisdiction should suffice to permit enforcement of § 1382 on the Highway 1 easement, but whether it should suffice *in light of* the concurrent presence of the Highway 1 easement and the affirmative right the easement affords members of the public to be on that road.

As the Ninth Circuit correctly held in this case and in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), the answer is no: Section 1382 requires the government to have exclusive right of possession over the area of the alleged trespass. An easement destroys the requisite exclusive possession because it gives the public the right to be there. Simply put, Apel, like anyone else, had a right to be present at all times on this stretch of public highway outside the military base.

The easement's clause subjecting Highway 1's "use and occupation . . . to such rules and regulations as the [base commander] may prescribe . . . to properly protect the interests of the United States"[30] does

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[29] Gov't's Pet. 8.

[30] C.A. E.R. 65.

not justify a departure from the Ninth Circuit's holdings. There is a marked difference between legislating rules for conduct on the easement and barring people from even going upon the easement. The latter effectively voids the easement with respect to the barred individuals. This exercise of authority goes well beyond the scope of the "rules and regulations" clause.

In *United States v. Watson*, 80 F.Supp. 649 (E.D.Va. 1948), the United States acquired a strip of land subject to an implied public road easement. As the easement was implied, there was no written provision for the government's right to promulgate rules and regulations. The court explained that no such provision was necessary: the government had *exclusive* criminal jurisdiction of the road. *Id.* at 651. Hence the district court held the government had the authority "to police the road, and to punish the defendant for improper conduct on the road." *Id.* Nevertheless, the court held it was not within the government's authority to "proscri[be] . . . a correct use of the road." *Id.*

Similarly, here, the government may police Highway 1,[31] and it may punish conduct in violation of its rules and regulations pursuant to its authority under § 797 of Title 50 (punishing anyone who "willfully violates any defense property security regulation" with fine or imprisonment up to a year).

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[31] C.A. E.R. 213.

Consistent with *Watson*, however, the government may not outright exclude people from Highway 1 under the guise of enforcing such rules and regulations – at least, not so long as the easement continues in effect. The government may extinguish the easement "for failure to comply with any or all of the terms or condition of [its] grant, or for nonuse for a two-year period or abandonment of rights granted hereto."[32] But this is an all-or-nothing right. It cannot be selectively invoked for the limited purpose of excluding particular individuals, such as John Dennis Apel.

The government's claim that the holding in this case "create[s] a federal-law-free zone in which civilians may violate federal statutes with impunity" is hyperbole and a mischaracterization.[33] The only federal statute rendered unenforceable in the area of the easement by the decision below is § 1382. Any other federal statutes regulating conduct on federal property, such as 50 U.S.C. § 797 (punishing the violation of any "defense property security regulation"), continue to apply in that area.

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[32] C.A. E.R. 66 at ¶ 8.

[33] Gov't's Pet. 9.

B. The Text Of Section 1382 Does Not Justify Its Application To A Road Where the Public Has A Right To Be Present.

The textualist argument for § 1382 applying anywhere the federal government has some jurisdiction has no basis. The government rests this argument on the statute's prohibition on reentry into a military base "within the jurisdiction of the United States."[34] 18 U.S.C. § 1382. It claims the language "within the jurisdiction of the United States" contradicts any requirement that federal jurisdiction be exclusive, and further that the absence of language on ownership and possession forecloses any requirement that they be absolute and exclusive, respectively.[35]

The government devotes much attention to the phrase "within the jurisdiction of the United States." The government's construction of this phrase, however, is a red herring. The phrase cannot and does not have the vast, unbounded meaning the government urges upon it: that any measure of federal jurisdiction may sustain a conviction under § 1382, whatever the concurrent rights and interests lying in the area of the alleged trespass. Such a meaning is unsupported by precedent and unwarranted.

Not one court that has interpreted § 1382 has ascribed to the "within" language that meaning; the government in its Petition identifies no such decision.

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[34] Gov't's Pet. 7-9.

[35] Gov't's Pet. 8.

Evidently, the only court that has even addressed that language in the context of § 1382 is the district court of Maryland in *United States v. Holmes*, 414 F.Supp. 831 (D.Md. 1976). There, the court observed, "While this language is not entirely clear in its meaning, it probably refers to the situs of the geographical areas within which the statute applies rather than to any concept of the particular type of jurisdiction or control which the United States Government exercises over said geographical areas." *Id.*, 414 F.Supp. at 836. The court noted that the term "United States" is used in § 1382 merely in a "territorial sense": "it includes all places and waters, continental or insular, subject to the jurisdiction of the United States. . . ." *Id.* (citing 18 U.S.C. § 5). Thus, in *Holmes*, the court had no trouble finding that the area the defendant was alleged to have trespassed – the shores of a river in Harford County, Maryland – was "within the jurisdiction of the United States" for the purposes of § 1382, as it was "geographically within the continental area subject to the jurisdiction of the United States." *Id.*

Were this the extent of the inquiry, the posture of this case would be quite different: easement or no easement, it cannot be disputed that Apel was geographically within an area subject to the jurisdiction of the United States the times he was arrested. But the *Holmes* court did not stop there. Instead it proceeded to impose the exclusive-possession requirement from *Watson*:

> [I]n order for the United States to be able legally to prosecute the presence of the

> defendant upon the subaqueous area of the beach at Chillbury Point, it must not only have the right to exercise [territorial] jurisdiction over such areas, but it must also, as an element of the law of trespass, have a right of sole ownership or possession in those areas as against the defendant.

Id., 414 F.Supp. at 838. Thus, the court made clear that (1) this threshold finding of "territorial" jurisdiction is necessary but not sufficient for the exercise of § 1382; (2) such jurisdiction is separate and distinct from that entailed in absolute ownership and exclusive right of possession; and (3) *absolute ownership or exclusive right of possession is an additional requirement that must be met by the government before the government may enforce § 1382.*

For these reasons, the "within" language is not dispositive here. Although the government, of course, is correct that the text of a statute is controlling, the text does not control if it does not apply. This especially holds true where, as here, the text is of a criminal statute and the government's interpretation of that text would maximize the scope of criminal liability. *See Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

Furthermore, the government's interpretation of "within the jurisdiction of the United States" is not even plausible in the context of the statute. Defining "within the jurisdiction of the United States" as simply within the legislative and law enforcement

jurisdiction of the United States would make that phrase superfluous. *See United States v. Albertini*, 472 U.S. 675, 682 (1985) (rejecting limit on § 1382 to closed bases because such limit would make superfluous the proscription in paragraph (2) against going upon a base for a prohibited purpose). The notion that the United States might lack *legal* jurisdiction of its own "military, naval, or Coast Guard" bases is illogical. Anyone who finds himself within the boundaries of a United States military base is necessarily under some species of federal law jurisdiction. In fact, the government readily admits this in a footnote in the Petition, citing various Title 10 provisions that "define federal military installations as facilities 'under the jurisdiction' of the Department of Defense."[36] If the government's interpretation were correct, then § 1382 would lose none of its meaning or scope if it omitted the "within" language and read simply: "Whoever goes upon any military, naval, or Coast Guard base, or reenters one after having been barred, shall be fined or imprisoned not more than six months." *See Heckler v. Chaney*, 470 U.S. 821, 829 (1985) (noting common-sense principle that a statute is to be read to give effect to each of its clauses).

The government complains that the exclusive-possession requirement appears nowhere in the text of § 1382. The government seeks to limit § 1382 and

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[36] Gov't's Pet. 8 n.2 (citing, *e.g.*, 10 U.S.C. §§ 2687(e)(1), 2391(d)(1), 2667(i)(3)).

cites *Albertini* as providing support for a strict literal construction of § 1382.

Far from supporting the government's argument, *Albertini* undermines it, even as this Court there aspired to "follow the plain and unambiguous meaning of the statutory language." *Albertini*, 472 U.S. at 680. The letter of § 1382 draws no distinction between valid and invalid bar orders. *Id.* at 700 (Stevens, J., dissenting). Yet this Court agreed that "prosecution under § 1382 would be impermissible if based on an invalid bar order." *Id.* at 682; *compare with United States v. Jelinski*, 411 F.2d 476, 477 n.6 (5th Cir. 1969) ("The underlying bases of the [bar] order are not in issue in the criminal proceeding. The criminal responsibility under § 1382 is premised on a violation of the mandate of the order, not its substantive basis.").

Similarly, the letter of § 1382 does not insist that the bar order come from the base commander, only an "officer or person in command or charge thereof." Yet this Court left open the question "in what circumstances, if any, § 1382 can be applied where anyone other than the base commander has validly ordered a person not to re-enter a military base." *Albertini*, 472 U.S. at 684. Finally, the letter of § 1382 contains no requirement of knowledge or volition. Yet this Court expressly reserved the right to read one into the statute if presented with different facts: "[W]e [do not] decide or suggest that the statute can apply where a person unknowingly or unwillingly reenters a military installation." *Id.*

Perhaps most damaging to the government's reliance on *Albertini* is that decision's treatment of *Flower v. U.S.*, 407 U.S. 197, 198 (1972). Although the *Albertini* Court distinguished *Flower*'s facts in rejecting the defendant's First Amendment argument, it also preserved *Flower*'s holding: "The Court [in *Flower*] determined . . . that the military had abandoned *not only the right to exclude civilian traffic from the avenue,* but also any right to exclude leafleteers." *Albertini*, 472 U.S. at 685 (emphasis in original). This was taken by the Ninth Circuit in *United States v. Vasarajs*, 908 F.2d 443, 447 (9th Cir. 1990), correctly, to mean "that the government must exercise control over its property in order to preserve the right to exclude others from it pursuant to § 1382."

To be sure, the letter of § 1382 makes no mention of control or its exercise by the government. But this Court's decision in *Flower* and its subsequent ruling in *Albertini* demands that such a requirement be read into the statute. Consequently, the argument that the exclusive-possession requirement is improper or anomalous because it does not appear in the statute is wrong. This Court, as well as virtually all of the lower courts that have applied § 1382 have, whether expressly or impliedly, read extra-statutory requirements into § 1382, including the exclusive-possession requirement. Presumably, the courts have done this to avoid what Justice Stevens in his dissent in *Albertini* calls "the excesses of statutory literalism" and all the "oppressive and absurd consequences" in which they manifest themselves. *Albertini*, 472 U.S.

at 699 (Stevens, J., dissenting). The criminalization and punishment of a civilian peacefully present on a public road is as good an example of this as any. As Justice Stevens quotes, and as this Court has held, "It seems wiser to presume that 'the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.'" *Id.* (citing *United States v. Kirby*, 74 U.S. 482, 486 (1868)).

The decision of the court of appeals in this case was controlled by its earlier decision in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), which had the same issues and almost identical facts. There, as here, the court held that (1) absolute ownership or exclusive right of possession is an element of the offense of § 1382; (2) a public road easement deprives the government of absolute ownership or exclusive right of possession; and (3) as a result, the government may not enforce § 1382 against an individual present on a public road easement, even if the individual was previously barred from the base. Although the government points out that the court in this case "question[ed] the correctness" of *Parker*, given the chance to revisit it upon the government's petition for rehearing en banc, the court declined.

Parker rested on a uniform line of Ninth Circuit authorities, post-*Watson*, requiring a showing of absolute ownership or exclusive right of possession

for § 1382 to apply.[37] *See, e.g.*, *United States v. Vasarajs*, 908 F.2d 443 (9th Cir. 1990); *United States v. Douglass*, 579 F.2d 545 (9th Cir. 1978); *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978); *United States v. Packard*, 236 F.Supp. 585 (N.D.Cal. 1964), *aff'd sub nom. Packard v. U.S.*, 339 F.2d 887 (9th Cir. 1964). As *Parker* indicates, *Douglass* and *Vasarajs* specifically identify easements as an affirmative defense negating the government's absolute ownership or exclusive right of possession for purposes of § 1382. *Parker*, 651 F.3d at 1183 (citing *Vasarajs*, 908 F.2d at 446-47 (noting that government exercised actual control over area and defendant did not argue she or the public benefitted from an easement burdening that portion of roadway) and *Douglass*, 575 F.2d at 547 (rejecting defendant's argument that government lacked requisite ownership and possession of area where, inter alia, no easement resided in the public there)).

Vasarajs, in particular, is noteworthy because it follows this Court's decision in *Albertini*. Having occasion to consider *Albertini*, the court of appeals in *Vasarajs* correctly concluded that *Albertini* aligned with earlier cases in and outside of the circuit which

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[37] The court in *Parker* also noted that its position was consistent with the United States Attorney's Manual, which states that § 1382 applies to any military reservation "over which the United States has exclusive possession." *Parker*, 651 F.3d at 1183 n.2 (citing *U.S. Attorney's Manual, Title 9, Criminal Resource Manual* § 1634 (2010)).

had held that "the government may only bar civilians [pursuant to § 1382] . . . if it has exercised actual control over the area." *Vasarajs*, 908 F.2d at 447 (citing *Douglass*, 575 F.2d at 547 (concluding not only that "no easement residing in the public" existed, but that the record failed to "reflect any relinquishment of control over the area by the base personnel"); and *United States v. Renkoski*, 644 F.Supp. 1065 (W.D.Mo. 1986) ("Mere title to real estate does not allow issuance by the Government of a 'ban and bar' notice. The area in question must be controlled.")). The *Parker* court endorsed this treatment of *Albertini*, and properly determined that *Albertini*'s recognition of control as a condition predicate identified it with the requirement of absolute ownership or exclusive right of possession. *Parker*, 651 F.3d at 1184.

The government criticizes *Parker* for not addressing "the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command."[38] *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 893 (1961). But this begs the question of whether a commanding officer can exclude civilians from a public road over which an easement grants the public the right to be present. *McElroy* does not address this, which is the issue in this case. Indeed, the government cites no case that has allowed a base

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[38] Gov't's Pet. 10.

commander to exclude individuals from an "area of command" that included a public road easement.

II. THERE IS NO CIRCUIT SPLIT IN NEED OF RESOLUTION BY THIS COURT.

The government's claim of a circuit split is inaccurate. Besides the Ninth Circuit, the First, Second, and Eighth Circuits all have adopted some iteration of the absolute ownership or exclusive right of possession requirement as to § 1382. *See, e.g., United States v. Ventura-Melendez*, 275 F.3d 9 (1st Cir. 2001) (Navy "occupied and controlled" area of alleged trespass); *United States v. Allen*, 924 F.2d 29, 31 (2d Cir. 1991) (Navy had "exclusive rights to occupy . . . area"); *Holdridge v. United States*, 282 F.2d 302, 308 (8th Cir. 1960) (government's "exclusive possession" of the area was established); *see also United States v. Renkoski*, 644 F.Supp. 1065, 1066 (W.D.Mo. 1986) (area must be "controlled" to permit issuance of a bar order); *United States v. Holmes*, 414 F.Supp. 831, 838 (D.Md. 1976) ("[T]he United States . . . must . . . , as an element of the law of trespass, have a right of sole ownership or possession in those areas as against the defendant."); *United States v. Watson*, 80 F.Supp. 649, 651 (E.D.Va. 1948) ("[T]he United States must show an absolute ownership, or an exclusive right to the possession, of the road, in order to enforce [§ 1382].").

In other words, contrary to the government's assertion, this case would have come out exactly the same way in these other circuits. All recognize that

§ 1382 does not apply where the public has a right to be present.

Although closer to the government's position, the Sixth Circuit's rulings are not in conflict with the Ninth Circuit's decision in this case. In fact, based on *United States v. McCoy*, 866 F.2d 926 (6th Cir. 1989), the Sixth Circuit would likely have overturned Apel's convictions in this case, just as the Ninth Circuit did. The government's contention that "on the approach taken by [the First, Second, and Sixth] courts of appeals, [Apel]'s convictions in this case would be upheld" is simply untrue.

The issue in *McCoy* was whether the government could enforce Section 1382 over land it did not own. The Sixth Circuit held that the absence of government ownership is not a prerequisite to a Section 1382 violation so long as the government possesses and controls the property. *Id.* at 830-31 & n.4. While *McCoy* did not address the degree of government control or possession necessary to sustain a Section 1382 violation, the Sixth Circuit did not hold that anything less than exclusive possession or actual control is required. In fact, the land at issue in *McCoy* was marked off and controlled by the military; and thus was deemed by the Sixth Circuit to be part of the military base. Because the issue in *McCoy* was about ownership, not possession and control, there is no conflict with the court of appeals' decision here.

McCoy ostensibly adopts a mere "possessory interest" standard for when the government can

punish individuals under § 1382. *Id.* at 830. But in applying the standard, *McCoy* qualified its meaning. The Sixth Circuit decision went out of its way to adopt the portion of Justice Stevens's dissent in *Albertini* in which he expressed that "[t]he use of these military lands for the limited public purposes for which they have been set aside does not involve the bold defiance of authority that is foreseen by the structure of the statute and reflected in its legislative history." *Id.* at 831 (citing *Albertini*, 472 U.S. at 698-99 (Stevens, J., dissenting)). In other words, a defendant could not be convicted under § 1382 for proper use of an easement.

The Sixth Circuit then decided *McCoy* on the fact that the defendant had crossed a painted white line representing the boundary of the base and the end of the easement that existed on the adjacent highway. *McCoy*, 866 F.2d at 831 ("[W]hen [defendant] chose to cross the line separating the through traffic lane from the entrance to the military installation, she chose to break the law."). Had the defendant not crossed that line, the outcome of the case evidently would have been different. Here, unlike in *McCoy*, Apel did not cross the line; he stayed at all times on the highway within the area of the easement. Consequently, the Sixth Circuit would not have decided this case any differently.

Following *McCoy*, the Sixth Circuit in *United States v. LaValley*, 957 F.2d 1309, 1313-14 (6th Cir. 1992) reiterated its approval of Justice Stevens's reasoning. Contrary to the government's contentions,

LaValley does not endorse a possessory interest standard under which an easement would always be subject to § 1382. Rather, *LaValley* stands for the proposition, expressed by this Court in *Albertini*, "that the government must exercise control over its property in order to preserve the right to exclude others from it pursuant to § 1382." *Vasarajs*, 908 F.2d at 447 (citing *Albertini*, 472 U.S. at 685).

In *LaValley*, the defendants pushed down a snow fence to enter the restricted portions of a military base. *LaValley*, 957 F.2d at 1311. The snow fence, which had been newly erected by the base commander, blocked access to a previously accessible grassy strip that was covered by an easement. *Id.* The defendants' failure to respect the geographic restriction imposed by the base commander's snow fence was sufficient for the Sixth Circuit to affirm the convictions under § 1382. *Id.* at 1313-14. It did not matter in this instance that an easement lay on the grassy strip. The court of appeals held, "The mere fact that an easement had been granted to the state for the construction, maintenance and use of highway F-41 did not give the protestors the right, *in bold defiance of military authority*, to enter the base, after being previously barred." *Id.* at 1313 (emphasis added). The "bold defiance of authority" was not the defendants' sheer presence on an easement overlying base property, but their overrunning the snow fence after it had been put up by the base commander in a rightful exercise of control. *Id.* ("Unlike Justice Stevens' hypothetical person innocently traversing a highway

. . . , appellants . . . boldly defied military orders. They crossed over a snow fence on which warning signs were posted. They remained on [the restricted portions of] the base even after they were ordered to leave by the base authorities."); *see also Renkoski*, 644 F.Supp. at 1066 ("Even a temporary special form of control, such as a cordon, would doubtless suffice.") (citing *Albertini*, 472 U.S. at 688).

This case involves no such "bold defiance of authority." Apel went upon the easement peacefully and while there conducted himself peacefully. He used no force, removed no barriers, and infiltrated no restricted areas of the base. All Apel did was picket on a public street.[39] Thus, *LaValley* does not compel a contrary ruling from the Sixth Circuit in this case, any more than *McCoy*.

Nor, contrary to the government's assertion, do decisions of the First and Second Circuits create a conflict. While both circuits have cited *McCoy* for the proposition that fee ownership is not a prerequisite for enforcement of § 1382, neither circuit has adopted a standard that would allow the military to enforce § 1382 on property over which it lacks exclusive possession or actual control.

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[39] Not only was Apel on a public street, Apel was in an area of the public street which Vandenberg had specifically set aside for exactly the activity he was engaged in: peaceful protest demonstrations. This distinguishes Apel's conduct even further from the "bold defiance" of the fence-trampling defendants in *LaValley*.

The First Circuit in *Ventura-Melendez* and the Second Circuit in *Allen* applied an "occupation-and-control" test that is much the same as the absolute ownership or exclusive right of possession requirement used by the Ninth Circuit in this case and *Parker*. In both cases, enforcement jurisdiction was not defeated by the absence of absolute ownership because in each case the military exerted exclusive control over the subject area which, accordingly, was deemed part of the military reservation at issue. *See Ventura-Melendez*, 275 F.3d at 16-17 (citing *McCoy* for the proposition that government ownership of the property at issue is not a prerequisite to violating Section 1382 and extending enforcement jurisdiction to the area which federal regulations had designated a "danger zone" and over which federal regulations had conferred to the Navy the right to "occupy and control") [40]; *Allen*, 924 F.2d at 31 (citing *McCoy* for the proposition that government ownership is not a prerequisite to violating Section 1382 and extending enforcement to area which "Navy had exclusive right[ ] to occupy"). Nothing in *Ventura-Melendez* or *Allen* suggests that those courts would have found enforcement jurisdiction in a case where, as here, there was no exclusive right to occupy and/or control.

Here, the presence of the easement – and its occupation and use by the public – keeps Vandenberg

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[40] Significantly, in so holding, the First Circuit expressly recognized that the Second Circuit's holding in *Allen* echoed the Ninth Circuit's holding in *Mowat*. *Id.* at 31.

from having the necessary occupation and control to enforce § 1382 along the covered stretch of Highway 1 under the approaches of the First and Second Circuits.

In fact, none of the circuits that have considered the issue would have decided this case differently. There is no split among the circuits warranting review in this Court.

III. THE NATIONAL SECURITY CONCERNS RAISED IN THE PETITION ARE UNFOUNDED.

The government argues that depriving the military of the ability to convict under § 1382 for speech activities on public road easements threatens national security. The argument has no basis.

In advancing this argument, the government pointedly fails to describe the area of the easement. It is a public road that is but one small stretch of the Pacific Coast Highway, which runs throughout California along its coast. Along this road are a public middle school and a public Santa Maria City bus stop. Among its destinations are a public Amtrak station and a public beach. Traffic moves freely in both directions, and in large enough waves to require traffic lights at the intersections. The image the government conveys of a secure back road winding through a heavily fortified military complex has no basis in reality.

The government cites several cases involving defendants who infiltrated secured military bases and committed acts of sabotage once inside. The settings of these crimes include the "security zone" waters surrounding a naval base where a nuclear submarine was moored and which the defendants reached by swimming and paddling up a river (*Allen*); an island beach of Puerto Rico that was part of a naval camp dedicated to military maneuvers (*Ventura-Melendez*); and an Air Force building housing the ground control center for a military navigation system that the defendant, after breaking into the building, destroyed using a crowbar, boltcutters, hammer, and cordless drill (*United States v. Komisaruk*, 885 F.2d 490 (9th Cir. 1989)).

These cases are wholly inapposite to the issue in this case which involves speech on a public road where the public has an easement to be present. The government's ability to punish conduct within closed facilities is not endangered by preventing it from punishing speech in areas in which the public has a right to be present.

The government argues that easements pose a special threat because they are "permanent," "not easily monitored," and likely to "run near sensitive areas of military installations."[41] But it stands to reason that because they are permanent and less easily monitored, easements are purposely *not* located

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[41] Gov't's Pet. 15.

near sensitive areas of a military base (and vice versa), and in this way speech there is highly unlikely to be a threat.

That is the case at Vandenberg. It cannot be a coincidence that the security checkpoint into the controlled areas of the base is 200 yards, or the length of two football fields, beyond the green line where the Highway 1 easement meets the main gate entrance. Appropriately, the places most accessible from the Highway 1 easement are the visitors' center and the city bus stop – both of which sit just inside the green line; neither of which could be deemed "sensitive."

In light of these facts, the Hobson's choice posited by the government has no foundation. The public would suffer without the easements, but it should not have to because the government has no good cause to withhold them. Whatever security concerns may exist in the abstract, or in other cases, the government has failed to demonstrate that they exist here, in this particular case.

IV. APEL'S SPEECH ACTIVITIES ON HIGHWAY 1 WERE PROTECTED BY THE FIRST AMENDMENT.

As an alternative ground for the decision below, Apel had a First Amendment right to peacefully protest on Highway 1. The application of § 1382 in these circumstances was thus unconstitutional.

A. Highway 1 And The Designated Protest Area Are Public Fora.

At the time of his arrests, Apel was peacefully demonstrating in the designated protest area beside Highway 1. Apel was, therefore, engaged in First Amendment activity. *United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing . . . [is an] expressive activit[y] involving 'speech' protected by the First Amendment."). He was also in a place where the First Amendment has particular force: a public street.

"Streets are natural and proper places for the dissemination of information and opinion. One who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Flower v. U.S.*, 407 U.S. 197, 198-99 (1972). It cannot be disputed that the stretch of Highway 1 adjacent to Vandenberg's main gate entrance is a public street. Everywhere else along its route, which includes most of the Pacific coastline, Highway 1 is a public street. This particular segment of Highway 1 is no different merely because it happens to overlap with Vandenberg. Motorists and pedestrians travel it just as freely. There are no gates or sentries at the points of entry, or checkpoints anywhere in between. People come and go as they please.

"'Public places' historically associated with the free exercise of expressive activities, such as streets . . . are considered, without more, to be 'public

forums.'" *Grace*, 461 U.S. at 177. Indeed, public streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Highway 1, then, is a public forum.

It does not matter that Highway 1, here, is a public street only by virtue of an easement. It is no less a public forum for purposes of the First Amendment. As the Tenth Circuit has stated,

> Easements are . . . constitutionally cognizable property interests. [H]olding that an easement cannot be a forum would lead to the conclusion that many public streets and sidewalks are not public fora. Public highways or streets are often easements held for the public, with title to these property interests remaining in abutting property owners.

First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1122-23 (10th Cir. 2002). Thus, the Air Force may own the land crossed by Highway 1, but its mere title to that land cannot divest the street of the public character afforded it by the easement. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 947 (9th Cir. 2001).

Similarly, the base commander's declaration that Vandenberg is a "closed" base does not keep Highway 1 from being a public street if it otherwise has the characteristics of a public street. In other words, simply calling the base "closed" "does not alter its characteristics so as to make it something other than what it actually is." *Cf. Lebron v. Nat'l R.R. Passenger*

Corp., 513 U.S. 374, 393 (1995) (holding that Amtrak is subject to the First Amendment despite provision in its charter declaring it to be private corporation) (internal quotation and citation omitted). At least with respect to Highway 1, Vandenberg is not closed. To the extent the base commander's declaration could be construed as a manifestation of intent for Highway 1 *not* to be a public forum, that intent is irrelevant. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) ("[T]raditional public fora are open for expressive activity regardless of the government's intent.").

A public street remains a public forum even where, as here, it touches property that is specifically not a public forum. "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Grace*, 461 U.S. at 180. In *Grace*, this Court held that the public sidewalks forming the perimeter of the Supreme Court grounds represented a public forum even though the Supreme Court building and grounds the sidewalks abutted "had not been traditionally held open for the use of the public for expressive activities." *Id.* at 178. In so holding, the Court distinguished *Greer v. Spock*, 424 U.S. 828, 830 (1976):

> In *Greer,* the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, New Jersey, and were

> thus separated from the streets and sidewalks of the city itself. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.

Grace, 461 U.S. at 179-80; *compare with Albertini*, 472 U.S. at 678 (normally secured areas inside gates of closed military base not public fora despite being temporarily open to the public during annual open house). As this Court explained, "The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently." *Grace*, 461 U.S. at 179.

The same reasoning should apply to Highway 1 here. The road is open. Traffic is unimpeded. There are no gates, sentries, or checkpoints to suggest the road is anything other than an ordinary public road. These facts liken this case to *Flower*, and Highway 1 to New Braunfels Avenue. In *Flower*, 407 U.S. at 197, the Court summarily reversed the § 1382 conviction of a civilian who had been "quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio." Like Highway 1, New Braunfels Avenue "was a completely open street." *Id.* at 198. Like Highway 1, it "was a public thoroughfare no different than other streets in

the city." *Albertini*, 472 U.S. at 685 (reading *Flower*). No sentry or guard was posted at either entrance or anywhere along the street. *Flower*, 407 U.S. at 198. The street was open to unrestricted civilian traffic 24 hours a day. *Id.* Public transit vehicles, including buses, used the street as freely as did private vehicles. *Id.* As this Court held,

> Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street.

Id. The only difference between Highway 1 and New Braunfels Avenue is the manner by which they came to be public streets. New Braunfels Avenue was a public street because the commander of Fort Sam Houston had left it alone. Highway 1, now, is a public street because the commander of Vandenberg ceded it for that very purpose. He granted an easement, and thereupon relinquished exclusive legislative jurisdiction to the State and County. If New Braunfels Avenue was a public street, Highway 1 is even more so.

In the alternative, the designated protest area where Apel was demonstrating is a designated public forum. Designated public fora are created by purposeful governmental action. *Arkansas Educ. Television Comm'n*, 523 U.S. at 677. Government intent is the essential question to determining if a designated

public forum has been created. *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). That intent must be discerned from the government's policy and practice. *Cornelius*, 473 U.S. at 802.

Here, the government's intent to create a designated public forum could not be clearer. Vandenberg's 1989 Policy Statement provides in relevant part: "People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the Intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force Base, California."[42]

The record shows Vandenberg has consistently observed this policy statement since its adoption twenty-four years ago.[43] The government does not argue otherwise. The policy and practice of the government, then, evinces a plain intent to create a designated public forum in the designated protest area.

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[42] Statement of Facts, *supra*, n.8.

[43] *See* Statement of Facts, *supra*, n.8.

B. The Application Of § 1382 To A Public Road Outside An Enclosed Military Base Serves No Significant Government Interest.

In a public forum, "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Grace*, 461 U.S. at 177 (internal quotation and citation omitted).

Highway 1, including the designated protest area, is a public forum for the reasons stated. Consequently, if § 1382 is to operate to proscribe Apel's speech activities on Highway 1, it must meet the requirements of a reasonable time, place, and manner restriction. It does not. As applied to Highway 1, § 1382 serves no significant government interest.

Highway 1 is a public road which travels across Vandenberg-owned property but outside the jurisdictional boundaries of the base. This road is outside the green line, outside the main gate entrance, and outside the enclosed base that is Vandenberg proper. Further, it lies on an easement given to the concurrent jurisdiction of the State and County. Excluding Apel from a public road such as this serves no identifiable government interest. The government cites

security, as it frequently does.[44] But it speaks to this interest in generalities (easements are "permanent," "not easily monitored," and "may run near sensitive areas of military installations")[45] and rhetoric (the decision below "threatens substantial harm to the safe and orderly operation of military bases in the Ninth Circuit"),[46] not facts. As aptly expressed by Justice Marshall, "[T]he First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. Those interests cannot be invoked as a talismanic incantation to support any exercise of power." *Greer*, 424 U.S. at 852-53 (Marshall, J., dissenting).

Here, the government has not shown, and cannot show, that Apel's peaceful speech activities on Highway 1 threatened base security or that Apel's exclusion helped maintain it. *See Grace*, 461 U.S. at 182 ("There is no suggestion . . . that appellees' activities in any way obstructed the sidewalks or access to the [Supreme Court] Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds."). Absent that showing, Apel's mere proximity to the base as a result of his presence on an adjoining public street cannot give rise to a significant government interest in security. *See id.*; *cf.*

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[44] Gov't's Pet. 14-18.

[45] Gov't's Pet. 15.

[46] Gov't's Pet. 15.

Frisby, 487 U.S. at 481 ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.").

There is no colorable argument that excluding barred civilians from a public street that is *outside* an enclosed military base serves a significant government interest. This case is not *Greer*, where all the roads at issue were *inside* the enclosed military reservation. *Greer*, 424 U.S. at 830. Nor is this case *Albertini*, where the barred defendant used the occasion of an annual open house event to make his way inside the gates of a normally closed military base. *Albertini*, 472 U.S. at 678; *see also Parker*, 651 F.3d at 1184 ("*Albertini* did not address the scenario where a military base or area thereof is *permanently* open to the public by virtue of a public easement.") (emphasis in original).

Even barred, Apel retains the right to be present on Highway 1, a public road beyond the secure confines and exclusive jurisdiction of Vandenberg Air Force Base. So long as Apel is on that public road, his peaceful protest activities have the sanction and protection of the First Amendment.

CONCLUSION

The petition for a writ of a certiorari should be denied.

Respectfully submitted,

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APRIL 29, 2013

REPLY BRIEF

No. 12-1038

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 12-1038

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Section 1382 of Title 18 prohibits any person from reentering a military installation "within the jurisdiction of the United States" after having been ordered not to reenter by a commanding officer. Respondent concedes (Br. in Opp. 2, 4, 7, 13) that the express requirements of Section 1382 are satisfied here: following a valid barment order, respondent repeatedly reentered a federal military base within federal jurisdiction. Respondent nevertheless defends the decision below, which read into Section 1382 a requirement of exclusive possession that by respondent's own admission "does not appear in the statute." *Id.* at 17. The decision below is thus demonstrably incorrect, and it should not evade review on the theory that the government's petition seeks only error correction. See *id.* at 5. The court's erroneous interpretation of Section 1382 has created a conflict in the courts of appeals, and the Ninth Circuit's approach threatens substantial harm to the safe and orderly operation of

many of this Nation's military installations. This Court's review is warranted.

A. The Decision Below Is Incorrect

1. Respondent acknowledges that the statutory requirements of Section 1382 are met here if "any federal jurisdiction is sufficient." Br. in Opp. 7. "[I]t cannot be disputed," respondent admits, "that [he] was geographically within an area subject to the jurisdiction of the United States the times he was arrested." *Id.* at 13. Moreover, respondent concedes that "the letter of [Section] 1382 makes no mention of control or its exercise by the government." *Id.* at 17. As respondent puts it, "the exclusive-possession requirement * * * does not appear in the statute." *Ibid.* That is not a cause for concern for respondent, because in his view courts have and should "read extra-statutory requirements into [Section] 1382, including the exclusive-possession requirement." *Ibid.*

For the proposition that courts can add requirements to Section 1382 not to be found in its text, respondent cites (Br. in Opp. 17) the dissent in *United States* v. *Albertini*, 472 U.S. 675 (1985). But the Court in *Albertini* made clear that "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *Id.* at 680; see pp. 5-6, *infra*. Here, Section 1382 plainly and unambiguously applies to any unlawful reentry "within the jurisdiction of the United States." By respondent's own admission, "it cannot be disputed" that he was "within an area subject to the jurisdiction of the United States the times he was arrested." Br. in Opp. 13. Accordingly, the judgment below should be reversed. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (This Court "ordinarily re-

sist[s] reading words or elements into a statute that do not appear on its face.").

Respondent incorrectly argues (Br. in Opp. 14-15) that on the government's approach the phrase "within the jurisdiction of the United States" is superfluous. As originally enacted in 1909, the statute did not contain any jurisdictional element; it simply prohibited reentry following barment from any military reservation. See Act of Mar. 4, 1909, Pub. L. No. 60-350, ch. 21, § 45, 35 Stat. 1097. The question arose, however, whether the statute applied to the outlying possessions of the United States. See S. Rep. No. 739, 76th Cong., 1st Sess. 1 (1939). In 1940, Congress amended the statute to make clear that it applied "within the territory or jurisdiction of the United States, including the Canal Zone, Puerto Rico, and the Philippine Islands." Act of Mar. 28, 1940, Pub. L. No. 76-445, ch. 73, 54 Stat. 80. Then in 1948, when Congress codified the statute at 18 U.S.C. 1382, it removed the references to "territory" and "Canal Zone, Puerto Rico, and the Philippine Islands." See Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, § 1382, 62 Stat. 765. Congress did so because, with the exception of the Canal Zone, those areas were covered by the definition of "United States" that Congress contemporaneously adopted in Section 5 of Title 18. See H.R. Rep. No. 3190, 80th Cong., 1st Sess. A102 (1947); see also § 5, 62 Stat. 685 (1948). The phrase "within the jurisdiction of the United States" in Section 1382 is thus not superfluous. In conjunction with the broad definition of "United States" in Section 5, the phrase extends Section 1382 to military bases that are outside U.S. borders but that are nevertheless subject to U.S. jurisdiction.

2. Contrary to respondent's contention (Br. in Opp. 7-11), the federal government's grant of a roadway

easement across Vandenberg does not alter the analysis. The easement grants the State of California and Santa Barbara County a right-of-way to allow traffic across the land, provided that federal law (including Section 1382) otherwise permits individuals to travel through that area. Respondent is simply incorrect that the easement confers an absolute right of use and occupation that is not subject to federal, state, and local law. See, *e.g.*, *RKO-Stanley Warner Theatres, Inc.* v. *Mellon Nat'l Bank & Trust Co.*, 436 F.2d 1297, 1300 n.6 (3d Cir. 1970) (A public easement is "subject to power in the state to regulate or forbid altogether [the permitted activity] for the public benefit."); 1 Restatement (Third) of Property (Servitudes) § 3.1 cmt. c (2000) ("Many federal, state, and local statutes and other governmental regulations prohibit or restrict the use of servitudes."); *ibid.* ("[A] servitude that authorizes a use prohibited by zoning is illegal or unenforceable to that extent.").

Even assuming the easement were relevant, respondent recognizes (Br. in Opp. 8) that the use of an easement may be made subject to conditions by the grantor. Here, the easement expressly provides that the roadway's "use and occupation * * * shall be subject to such rules and regulations as the [base commander] may prescribe from time to time in order to properly protect the interests of the United States." C.A. E.R. 65. Vandenberg's base regulations say the same thing as Section 1382: anyone barred from Vandenberg may not reenter the base. See *id.* at 59. Respondent is left to argue (Br. in Opp. 10) that base regulations may regulate conduct on the easement but may not exclude anyone from the easement. That distinction has no basis in the language of the government's reservation of rights. Nor would it make sense for the gov-

ernment to have surrendered the authority to exclude: without that authority, the government often will lack an effective remedy for unlawful and disruptive conduct.

3. Respondent defends (Br. in Opp. 29-38) the judgment below on the alternative ground that his conduct was protected by the First Amendment. As respondent recognizes (*id.* at 5 n.22), the court of appeals did not reach that ground. Respondent does not provide any reason why this Court should depart from its usual practice of reversing the court of appeals' incorrect statutory holding and permitting that court to consider respondent's constitutional claim on remand. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 n.7 (2005); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). In any event, as the government explained in its petition (at 11 n.5), respondent's First Amendment argument lacks merit for the reasons given by the district court. See Pet. App. 11a-14a. Even assuming that the designated protest area at Vandenberg qualifies as a limited public forum, this Court held in *Albertini* that "Section 1382 is content-neutral and serves a significant [g]overnment interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security." 472 U.S. at 687.

B. The Decision Below Is In Conflict With Decisions Of This Court And Other Courts Of Appeals

The decision below conflicts with this Court's decision in *Albertini*, as well as with decisions of the First, Second, and Sixth Circuits. Respondent avoids a conflict only by misdescribing those cases and their holdings.

1. In *Albertini*, defendant James Albertini attended an open house at a military base years after having been barred from reentering that base, for which he was convicted of violating Section 1382. See 472 U.S. at 677.

Although Albertini challenged his conviction on First Amendment grounds, the Court asked the parties to address the predicate question of whether Albertini's conduct was covered by Section 1382. See *id.* at 680-681. Albertini argued that his conduct was not covered by the statute for three reasons: he had reentered the base long after being ordered not to return; at the time of his reentry, the base was open to the general public for purposes of its open house; and he was allegedly unaware that his conduct violated the previous barment order. See *id.* at 681.

This Court rejected all three efforts to engraft an extratextual limitation onto Section 1382. "First," the Court reasoned, "nothing in the statute or its history supports the assertion that [Section] 1382 applies only to reentry that occurs within some 'reasonable' period of time." 472 U.S. at 682. Thus, even assuming "most prosecutions * * * have involved reentry within a year after issuance of a bar order," that fact would not "justif[y] engrafting onto [Section] 1382 a judicially defined time limit." *Ibid.* The Court further reasoned that Section 1382 "applies during an open house," because "[t]he language of the statute does not limit [Section] 1382 to military bases where access is restricted." *Ibid.* Finally, the Court held that Section 1382 does not require the specific intent to violate a barment order: the statute "does not contain the word 'knowingly' or otherwise refer to the defendant's state of mind." *Id.* at 683.

The decision below adds an extratextual requirement to Section 1382 and is therefore irreconcilable with *Albertini*. The *Albertini* Court made clear that, in interpreting Section 1382, lower courts should "follow the plain and unambiguous meaning of the statutory language" rather than "engraft[] onto" the statute "judi-

cially defined" limits. 472 U.S. at 682. Here, the court of appeals did exactly what *Albertini* forbids. The court engrafted onto Section 1382 a limit that the statute does not contain—*i.e.*, a requirement of exclusive ownership or possession. Congress specified that the statute applies whenever the defendant's reentry is "within the jurisdiction of the United States," without saying anything about exclusive possession. Congress well knows how to provide that limitation. See, *e.g.*, 15 U.S.C. 3603(3) (defining common areas of certain housing projects to be spaces not designated "for exclusive possession or use"); cf. 18 U.S.C. 793(a) (prohibiting the gathering of defense information from, *inter alia*, any area "within the exclusive jurisdiction of the United States").

Respondent argues (Br. in Opp. 16) that, no matter what the Court in *Albertini* said, in fact it departed from the statutory text. According to respondent, the Court read into Section 1382 a requirement that an existing barment order must be valid in order to sustain a prosecution under the statute. See *ibid.* (citing *Albertini*, 472 U.S. at 682). Respondent infers that it was therefore permissible for the Ninth Circuit to read into Section 1382 a requirement of exclusive possession. But in noting that an existing barment order must be valid, *Albertini* interpreted the actual text of the statute. The Court concluded that a defendant has been "ordered not to reenter," 18 U.S.C. 1382, only if the commanding officer's order is valid at the time of a defendant's reentry. That act of interpreting the statute's actual text does not remotely license courts of appeals to supplement that text as they see fit.

Respondent points (Br. in Opp. 17) to *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam), in which this Court summarily reversed a conviction under Section

1382. The defendant in *Flower* was distributing leaflets on a public street within a military base from which he had previously been barred. See *id.* at 197-198. The Court set aside the conviction because "the military had abandoned not only the right to exclude civilian traffic from the avenue, but also any right to exclude leafleteers." *Albertini*, 472 U.S. at 685. *Flower* thus "establishes that where a portion of a military base constitutes a public forum because the military has abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression, a person may not be excluded from that area on the basis of activity that is itself protected by the First Amendment." *Id.* at 685-686 (internal citation omitted).

That proposition is of no help to respondent. The Court in *Flower* did not question that the defendant's conduct was covered by Section 1382; the Court adjudicated only a *constitutional* challenge, not a *statutory* one. If anything, *Flower* confirms that the court of appeals erred in requiring the government to show exclusive possession of the designated protest area at Vandenberg. Nothing in *Flower* suggests that the federal government had exclusive possession of the public street at issue there. Nor does *Flower* lend any support to respondent's First Amendment argument, because Vandenberg's designated protest area is not a traditional public forum and the base commander has not "abandoned any right to exclude" individuals like petitioner who are subject to valid barment orders. *Albertini*, 472 U.S. at 685. Indeed, the Vandenberg base commander has actively sought to exercise that right, and only the court of appeals' incorrect statutory holding has prevented him from doing so.

2. The decision below is also in conflict with decisions of the First, Second, and Sixth Circuits. As the government explained in its petition (at 13-14), those circuits have rejected an exclusive-possession requirement. They have held that Section 1382 "requires only that the government demonstrate either a possessory interest in, or occupation or control of, the area reserved by the military." *United States* v. *Ventura-Meléndez*, 275 F.3d 9, 17 (1st Cir. 2001); see *United States* v. *Allen*, 924 F.2d 29, 31 (2d Cir. 1991) (per curiam); *United States* v. *LaValley*, 957 F.2d 1309, 1313 (6th Cir.), cert. denied, 506 U.S. 972 (1992); *United States* v. *McCoy*, 866 F.2d 826, 830 (6th Cir. 1989). On the approach taken by three other courts of appeals, the government would prevail because it owns the property at issue.

Respondent is correct (Br. in Opp. 21) that because the federal government did not own the underlying lands at issue in *Ventura-Meléndez* and *Allen*, the First and Second Circuits relied on the occupation-or-control prong rather than the possessory-interest prong. See *Ventura-Meléndez*, 275 F.3d at 17; *Allen*, 924 F.2d at 31. But the First and Second Circuits did not suggest—and there is no reason to posit—that the government should have less authority to enforce Section 1382 *when it actually owns* the land at issue. Moreover, the Air Force has policed the easement across Vandenberg just as the Navy policed the danger zone waters in *Ventura-Meléndez*, see 275 F.3d at 17-18, and the security zone waters in *Allen*, see 924 F.3d at 31. Thus, even if occupation and control (but not possession) were the sole test, the government could satisfy it.

Respondent has no persuasive way to distinguish the Sixth Circuit's decisions in *LaValley* and *McCoy*. In each case, the defendant was cited for violating Section

1382 in an area of a military base subject to a roadway easement. And in each case, the Sixth Circuit upheld the defendant's conviction on the ground that "an easement * * * did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred." *LaValley*, 957 F.2d at 1313; see *McCoy*, 866 F.2d at 830-831 & n.4. That same reasoning would dictate that respondent's convictions be upheld. Indeed, the Sixth Circuit in *McCoy* rejected the Ninth Circuit's exclusive-possession requirement, see 866 F.2d at 830-831 & n.4, and both the Ninth Circuit and respondent have acknowledged the conflict between that court's approach and *McCoy*, see *United States* v. *Parker*, 651 F.3d 1180, 1183 n.2 (2011); 11-50003, Doc. No. 41, at 17 (9th Cir. Aug. 17, 2012) (recognizing that in *McCoy* "the Sixth Circuit dismissed the Ninth Circuit's * * * exclusive right of possession requirement"). This Court's review is warranted to resolve that conflict.

C. The Decision Below Is Settled Circuit Law That Threatens Substantial Harm To The Safe And Orderly Operation Of Many Of This Nation's Military Installations

Respondent agrees (Br. in Opp. 18-19) with the government that the decision below is settled circuit law. See Pet. 16-17. Respondent also agrees that the decision below puts base commanders to an "all-or-nothing" choice, Br. in Opp. 11: they must restrict access to civilian traffic altogether or tolerate disruptive and even dangerous conduct by repeat offenders who refuse to comply with base rules and regulations. See Pet. 14-16. Respondent doubts (Br. in Opp. 28-29) that easements run near sensitive areas of military installations. But in light of the fact that many major military bases contain easements, see Pet. 15, it is likely that easements can and do run near sensitive areas. Moreover, proven vio-

lators in even nonsensitive areas remain a threat to enter the base and cause harm to persons or property. Cf. *United States* v. *Komisaruk*, 885 F.2d 490, 491 (9th Cir. 1989) (defendant entered Vandenberg and vandalized a space shuttle navigational system).

Finally, respondent argues (Br. in Opp. 10-11) that the government may rely on its authority under 50 U.S.C. 797 to fine or imprison anyone who "willfully violates any defense property security regulation." But Section 797 applies to certain property "subject to the jurisdiction, administration, or in the custody of the Department of Defense." 50 U.S.C. 797(a)(4)(A). Respondent does not say why on his interpretive approach Section 797 would not also be subject to an "extra-statutory" requirement of exclusive possession or control. Br. in Opp. 17. Assuming, however, that it is not, then respondent's view is that the government can fine and *imprison* him for violating his barment order—but it cannot take the lesser step of fining and *excluding* him for precisely the same conduct. That simply does not make any sense.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MAY 2013

JOINT APPENDIX

SUPREME COURT, U.S.
FILED
AUG 16 2013
OFFICE OF THE CLERK

No. 12-1038

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: FEB. 22, 2013
CERTIORARI GRANTED: JUNE 3, 2013

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 11-50003

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/7/11	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF APPELLANT IN PRO PER AND COUNSEL FOR APPELLEE. Reporters Transcript required: Yes. Sentence imposed: $250.00 fine. Transcript ordered by 01/26/2011. Transcript due 03/28/2011. Appellant briefs and excerpts due by 05/09/2011 for John Dennis Apel. Appellee brief due 06/08/2011 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [7603363]—[Edited: Corrected docket text to reflect sentence fine. Resent NDA. 01/07/2011 by RY] (FB)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/14/11	8	Submitted (ECF) Opening brief for review. Submitted by Appellant John Dennis Apel. Date of service: 11/14/2011. [7964514] (EC)
11/15/11	9	Filed clerk order: The opening brief [8] submitted by John Dennis Apel is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7966830] (WP)
11/15/11	10	Filed Appellant John Dennis Apel excerpts of record in 2 volumes. Served on 11/14/2011. [7966919] (WP)
		* * * * *
12/08/11	14	Filed (ECF) Appellant John Dennis Apel Motion to consolidate cases 11-50003 11-50004 11-50005. Date of service: 12/08/2011. [7993925] (EC)
12/12/11	15	Filed clerk order (Deputy Clerk: JAC): Appellant's unopposed motion to consolidate the above-captioned appeals is granted. Appeal Nos. 11-50003 11-50004, and 11-50005 are consolidated. The briefing schedule established December 5, 2011 shall continue in effect.

DATE	DOCKET NUMBER	PROCEEDINGS
		[7996411] [11-50003, 11-50004, 11-50005] (AF)
1/13/12	16	Submitted (ECF) Answering brief for review. Submitted by Appellee USA in 11-50003, 11-50004, 11-50005. Date of service: 01/13/2012. [8032348] [11-50003, 11-50004, 11-50005] (MJR)
1/17/12	17	Filed clerk order: The answering brief [16] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. [8032993] [11-50003, 11-50004, 11-50005] (LA)
		* * * * *
2/3/12	19	Submitted (ECF) Reply brief for review. Submitted by Appellant John Dennis Apel in 11-50003, 11-50004, 11-50005. Date of service: 02/03/2012. [8056731] [11-50003, 11-50004, 11-50005] (EC)
2/6/12	20	Filed clerk order: The reply brief [19] submitted by John Dennis Apel is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each

DATE	DOCKET NUMBER	PROCEEDINGS
		copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. [8056942] [11-50003, 11-50004, 11-50005] (WP)
		* * * * *
2/13/12	24	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 Motion for miscellaneous relief [Petition for Initial Hearing En Banc]. Date of service: 02/13/2012. [8067335] [11-50003, 11-50004, 11-50005]—[COURT UPDATE: Edited docket text to reflect the content of the filing. Resent NDA. 02/15/2012 by DB] (MRY)
		* * * * *
3/28/12	27	No active judge has requested a vote to hear this case initially en banc within the time allowed by General Order 5.2.a. The request is therefore denied. [8119455] [11-50003, 11-50004, 11-50005] (HH)
		* * * * *
4/13/12	32	ARGUED AND SUBMITTED TO BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM. [8139147] [11-50003, 11-50004, 11-50005] (LN)
4/25/12	33	FILED PER CURIAM OPINION (BARRY G. SILVERMAN, JOHNNIE

DATE	DOCKET NUMBER	PROCEEDINGS
		B. RAWLINSON and JOHN R. TUNHEIM) REVERSED. FILED AND ENTERED JUDGMENT. [8152345] [11-50003, 11-50004, 11-50005] (RP)
		* * * * *
4/27/12	35	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 Motion to extend time to file petition for rehearing until 06/25/2012. Date of service: 04/27/2012. [8156503] [11-50003, 11-50004, 11-50005] (CAK)
5/1/12	36	Filed order (BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM): The government's unopposed motion for an extension of time to file a petition for rehearing en banc is GRANTED. The petition is due no later than June 25, 2012. [8160657] [11-50003, 11-50004, 11-50005] (AF)
6/25/12	37	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 petition for rehearing en banc (from 04/25/2012 opinion). Date of service: 06/25/2012. [8227277] [11-50003, 11-50004, 11-50005] (MRY)

DATE	DOCKET NUMBER	PROCEEDINGS
6/27/12	38	Filed order (BARRY G. SILVERMAN): Defendant-appellant John Dennis Apel is directed to file a response to the government's petition for rehearing en banc filed with this court on June 25, 2012. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [8229743] [11-50003, 11-50004, 11-50005] (AF)
		* * * * *
8/17/12	41	Filed (ECF) Appellant John Dennis Apel reply to to set response by any party to anything. Date of service: 08/17/2012. [8291065].—[COURT UPDATE: Spread docket text to 11-50004 and 11-50005. Resent NDA. 08/17/2012 by RY] (EC)
9/27/12	42	Filed order (BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM): Judges Silverman and Rawlinson voted to deny the petition for rehearing en banc, and Judge Tunheim recommended granting

DATE	DOCKET NUMBER	PROCEEDINGS
		the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [8339180] [11-50003, 11-50004, 11-50005] (AF)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 11-50004

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/7/11	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF APPELLANT IN PRO PER AND COUNSEL FOR APPELLEE. Reporters Transcript required: Yes. Sentence imposed: $250.00 fine. Transcript ordered by 01/26/2011. Transcript due 03/28/2011. Appellant briefs and excerpts due by 05/09/2011 for John Dennis Apel. Appellee brief due 06/08/2011 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [7603417]—[Edited: Added sentence fine. 01/07/2011 by RY] (FB)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/14/11	8	Submitted (ECF) Opening brief for review. Submitted by Appellant John Dennis Apel. Date of service: 11/14/2011. [7964523] (EC)
11/15/11	9	Filed clerk order: The opening brief [8] submitted by John Dennis Apel is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7966885] (WP)
11/15/11	10	Filed Appellant John Dennis Apel excerpts of record in 2 volumes. Served on 11/14/2011. [7966912] (WP)
		* * * * *
12/12/11	13	Filed clerk order (Deputy Clerk: JAC): Appellant's unopposed motion to consolidate the above-captioned appeals is granted. Appeal Nos. 11-50003 11-50004, and 11-50005 are consolidated. The briefing schedule established December 5, 2011 shall continue in effect. [7996411] [11-50003, 11-50004, 11-50005] (AF)
1/13/12	14	Submitted (ECF) Answering brief for review. Submitted by Appellee USA in 11-50003, 11-50004, 11-50005. Date

DATE	DOCKET NUMBER	PROCEEDINGS
		of service: 01/13/2012. [8032348] [11-50003, 11-50004, 11-50005] (MJR)
1/17/12	15	Filed clerk order: The answering brief [14] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. [8032993] [11-50003, 11-50004, 11-50005] (LA)
		* * * * *
2/3/12	17	Submitted (ECF) Reply brief for review. Submitted by Appellant John Dennis Apel in 11-50003, 11-50004, 11-50005. Date of service: 02/03/2012. [8056731] [11-50003, 11-50004, 11-50005] (EC)
2/6/12	18	Filed clerk order: The reply brief [17] submitted by John Dennis Apel is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically.

DATE	DOCKET NUMBER	PROCEEDINGS
		Cover color: red. [8056942] [11-50003, 11-50004, 11-50005] (WP)
		* * * * *
2/13/12	22	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 Motion for miscellaneous relief [Petition for Initial Hearing En Banc]. Date of service: 02/13/2012. [8067335] [11-50003, 11-50004, 11-50005]—[COURT UPDATE: Edited docket text to reflect the content of the filing. Resent NDA. 02/15/2012 by DB] (MRY)
		* * * * *
3/28/12	25	No active judge has requested a vote to hear this case initially en banc within the time allowed by General Order 5.2.a. The request is therefore denied. [8119455] [11-50003, 11-50004, 11-50005] (HH)
		* * * * *
4/13/12	30	ARGUED AND SUBMITTED TO BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM. [8139147] [11-50003, 11-50004, 11-50005] (LN)
4/25/12	31	FILED PER CURIAM OPINION (BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM) REVERSED. FILED

DATE	DOCKET NUMBER	PROCEEDINGS
		AND ENTERED JUDGMENT. [8152345] [11-50003, 11-50004, 11-50005] (RP)
		* * * * *
4/27/12	33	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 Motion to extend time to file petition for rehearing until 06/25/2012. Date of service: 04/27/2012. [8156503] [11-50003, 11-50004, 11-50005] (CAK)
5/1/12	34	Filed order (BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM): The government's unopposed motion for an extension of time to file a petition for rehearing en banc is GRANTED. The petition is due no later than June 25, 2012. [8160657] [11-50003, 11-50004, 11-50005] (AF)
6/25/12	35	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 petition for rehearing en banc (from 04/25/2012 opinion). Date of service: 06/25/2012. [8227277] [11-50003, 11-50004, 11-50005] (MRY)
6/27/12	36	Filed order (BARRY G. SILVERMAN): Defendant-appellant John Dennis Apel is directed to file a response to the government's petition for rehearing en banc filed with this

DATE	DOCKET NUMBER	PROCEEDINGS
		court on June 25, 2012. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [8229743] [11-50003, 11-50004, 11-50005] (AF)
		* * * * *
8/17/12	39	Filed (ECF) Appellant John Dennis Apel reply to to set response by any party to anything. Date of service: 08/17/2012. [8291065].—[COURT UPDATE: Spread docket text to 11-50004 and 11-50005. Resent NDA. 08/17/2012 by RY] (EC)
9/27/12	40	Filed order (BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM): Judges Silverman and Rawlinson voted to deny the petition for rehearing en banc, and Judge Tunheim recommended granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.

DATE	DOCKET NUMBER	PROCEEDINGS
		App. P. 35. The petition for rehearing en banc is DENIED. [8339180] [11-50003, 11-50004, 11-50005] (AF)
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 11-50005

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DENNIS APEL, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/7/11	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF APPELLANT IN PRO PER AND COUNSEL FOR APPELLEE. Reporters Transcript required: Yes. Sentence imposed: $250.00 fine. Transcript ordered by 01/26/2011. Transcript due 03/28/2011. Appellant briefs and excerpts due by 05/09/2011 for John Dennis Apel. Appellee brief due 06/08/2011 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [7603455]—[Edited: Added sentence fine. 01/07/2011 by RY] (FB)
		* * * * *
11/14/11	8	Submitted (ECF) Opening brief for review. Submitted by Appellant John

DATE	DOCKET NUMBER	PROCEEDINGS
		Dennis Apel. Date of service: 11/14/2011. [7964535] (EC)
11/15/11	9	Filed clerk order: The opening brief [8] submitted by John Dennis Apel is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7966897] (WP)
11/15/11	10	Filed Appellant John Dennis Apel excerpts of record in 2 volumes. Served on 11/14/2011. [7966908] (WP)
		* * * * *
12/12/11	13	Filed clerk order (Deputy Clerk: JAC): Appellant's unopposed motion to consolidate the above-captioned appeals is granted. Appeal Nos. 11-50003 11-50004, and 11-50005 are consolidated. The briefing schedule established December 5, 2011 shall continue in effect. [7996411] [11-50003, 11-50004, 11-50005] (AF)
1/13/12	14	Submitted (ECF) Answering brief for review. Submitted by Appellee USA in 11-50003, 11-50004, 11-50005. Date of service: 01/13/2012. [8032348] [11-50003, 11-50004, 11-50005] (MJR)

DATE	DOCKET NUMBER	PROCEEDINGS
1/17/12	15	Filed clerk order: The answering brief [14] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. [8032993] [11-50003, 11-50004, 11-50005] (LA)
		* * * * *
2/3/12	17	Submitted (ECF) Reply brief for review. Submitted by Appellant John Dennis Apel in 11-50003, 11-50004, 11-50005. Date of service: 02/03/2012. [8056731] [11-50003, 11-50004, 11-50005] (EC)
2/6/12	18	Filed clerk order: The reply brief [17] submitted by John Dennis Apel is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. [8056942] [11-50003, 11-50004, 11-50005] (WP)
		* * * * *
2/13/12	22	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 Motion for miscella-

DATE	DOCKET NUMBER	PROCEEDINGS
		neous relief [Petition for Initial Hearing En Banc]. Date of service: 02/13/2012. [8067335] [11-50003, 11-50004, 11-50005]—[COURT UPDATE: Edited docket text to reflect the content of the filing. Resent NDA. 02/15/2012 by DB] (MRY)
		* * * * *
3/28/12	25	No active judge has requested a vote to hear this case initially en banc within the time allowed by General Order 5.2.a. The request is therefore denied. [8119455] [11-50003, 11-50004, 11-50005] (HH)
		* * * * *
4/13/12	30	ARGUED AND SUBMITTED TO BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM. [8139147] [11-50003, 11-50004, 11-50005] (LN)
4/25/12	31	FILED PER CURIAM OPINION (BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM) REVERSED. FILED AND ENTERED JUDGMENT. [8152345] [11-50003, 11-50004, 11-50005] (RP)
		* * * * *
4/27/12	33	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 Motion to extend

DATE	DOCKET NUMBER	PROCEEDINGS
		time to file petition for rehearing until 06/25/2012. Date of service: 04/27/2012. [8156503] [11-50003, 11-50004, 11-50005] (CAK)
5/1/12	34	Filed order (BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM): The government's unopposed motion for an extension of time to file a petition for rehearing en banc is GRANTED. The petition is due no later than June 25, 2012. [8160657] [11-50003, 11-50004, 11-50005] (AF)
6/25/12	35	Filed (ECF) Appellee USA in 11-50003, 11-50004, 11-50005 petition for rehearing en banc (from 04/25/2012 opinion). Date of service: 06/25/2012. [8227277] [11-50003, 11-50004, 11-50005] (MRY)
6/27/12	36	Filed order (BARRY G. SILVERMAN): Defendant-appellant John Dennis Apel is directed to file a response to the government's petition for rehearing en banc filed with this court on June 25, 2012. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original

DATE	DOCKET NUMBER	PROCEEDINGS
		response plus 50 paper copies. [8229743] [11-50003, 11-50004, 11-50005] (AF)
		* * * * *
8/17/12	39	Filed (ECF) Appellant John Dennis Apel reply to to set response by any party to anything. Date of service: 08/17/2012. [8291065].—[COURT UPDATE: Spread docket text to 11-50004 and 11-50005. Resent NDA. 08/17/2012 by RY] (EC)
9/27/12	40	Filed order (BARRY G. SILVERMAN, JOHNNIE B. RAWLINSON and JOHN R. TUNHEIM): Judges Silverman and Rawlinson voted to deny the petition for rehearing en banc, and Judge Tunheim recommended granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [8339180] [11-50003, 11-50004, 11-50005] (AF)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION-LOS ANGELES)

Docket No. 2:10-cr-00830-JFW-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN DENNIS APEL, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/28/10	2	CENTRAL VIOLATIONS BUREAU proceedings file for CVB Citation Number: 1981283, 2576523, and 1982007. Proceedings held before Magistrate Judge Rita C Federman prior to the filing of criminal case. (Attachments: # 1 Citation Number 2576523, # 2 Citation Number 1982007). (jp) (Entered: 08/03/2010)
7/28/10	3	NOTICE OF APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE DECISION to District Court by Defendant John Dennis Apel. Appeal taken from case Magistrate Judge Rita C. Federman. (jp) (Entered: 08/03/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
10/1/10	7	APPEAL OF CONVICTION AND SENTENCING ENTERED BY MAGISTRATE JUDGE OPENING BRIEF. Filed by Defendant John Dennis Apel. (jp) (Entered: 10/05/2010)
10/25/10	8	BRIEF Filed by Plaintiff USA as to Defendant John Dennis Apel (Attachments: # 1 Exhibit EXHIBIT 1-3) (McCaslin, Sharon) (Entered: 10/25/2010)
11/5/10	19	APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE APPELLANT'S REPLY to Brief 8, filed by Defendant John Dennis Apel. (jp) (Entered: 12/10/2010)
		* * * * *
11/24/10	12	TRANSCRIPT filed as to Defendant John Dennis Apel for proceedings held on 7-15-10 9:12 p.m.. Court Reporter/ Electronic Court Recorder: Exceptional Reporting Services, phone number (877) 670-7774. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due

DATE	DOCKET NUMBER	PROCEEDINGS
		12/15/2010. Redacted Transcript Deadline set for 12/25/2010. Release of Transcript Restriction set for 2/22/2011. (ha) (Entered: 11/24/2010)
		* * * * *
11/24/10	17	APPEAL OF CONVICTION AND SENTENCING ENTERED BY MAGISTRATE JUDGE APPELLANT'S SUBMISSION OF MOTION TO DISMISS BRIEF. Filed by Defendant John Dennis Apel. (jp) (Additional attachment(s) added on 12/8/2010: # 1 Part 2, # 2 Part 3, # 3 Part 4) (jp). (Entered: 12/08/2010)
11/30/10	20	APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE APPELLANT'S SUBMISSION OF TRANSCRIPTS filed by Defendant John Dennis Apel. (Attachments: # 1 Part 2, # 2 Part 3, # 3 Part 4, # 4 Part 5). (jp) (Entered: 12/10/2010)
		* * * * *
12/28/10	22	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: as to Defendant John Dennis Apel re: ORDER AFFIRMING JOHN DENNIS APEL'S CONVICTIONS AND SENTENCE. (kbr) (Entered: 12/28/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
1/5/11	23	NOTICE OF APPEAL OF CONVICTION AND SENTENCE; CONTINUANCE OF PROCEEDING IN FORMA PAUPERIS; AND MOTION FOR APPOINTMENT OF COUNSEL TO APPELLATE COURT (Interlocutory) filed by Defendant John Dennis Apel re MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: as to Defendant John Dennis Apel re: ORDER AFFIRMING JOHN DENNIS APEL'S CONVICTIONS AND SENTENCE. (kbr) 22. Filed on: 12/28/2010; Entered on: 12/28/2010; Filing Fee. Waived. See document number 6. cc: John Dennis Apel, pro se; United States Attorney. (lr) (Entered: 01/06/2011)

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION-LOS ANGELES)

Docket No. 2:10-cr-00831-JFW-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN DENNIS APEL, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/28/10	2	CENTRAL VIOLATIONS BUREAU proceedings file for CVB Citation Number: CC-21 1981283. Proceedings held before Magistrate Judge Rita C. Federman prior to the filing of criminal case. (gk) (Entered: 08/05/2010)
7/28/10	3	NOTICE OF APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE to District Court by Defendant John Dennis Apel. Appeal taken from case Magistrate Judge Rita Coyne Federman. (gk) (Entered: 08/05/2010)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/1/10	10	APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE OPENING BRIEF. Filedby Defendant John Dennis Apel. (jp) (Entered: 10/05/2010)
10/25/10	11	BRIEF Filed by Plaintiff USA as to Defendant John Dennis Apel (Attachments: # 1 Exhibit exhibit 1-3) (McCaslin, Sharon) (Entered: 10/25/2010)
11/5/10	23	APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE APPELLANT'S REPLY to Brief 11 filed by Defendant John Dennis Apel. (jp) (Entered: 12/10/2010)
		* * * * *
11/24/10	15	TRANSCRIPT filed as to Defendant John Dennis Apel for proceedings held on 7-15-10 9:12 a.m.. Court Reporter/ Electronic Court Recorder: Exceptional Reporting Services Inc., phone number (877) 670-7774. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/15/2010. Redacted Transcript

DATE	DOCKET NUMBER	PROCEEDINGS
		Deadline set for 12/25/2010. Release of Transcript Restriction set for 2/22/2011. (ha) (Entered: 11/24/2010)
		* * * * *
11/24/10	17	TRANSCRIPT filed as to Defendant John Dennis Apel for TRIAL proceedings held on 7/15/10 10:18am and 1:40pm. Court Reporter/Electronic Court Recorder: Exceptional Reporting Services, Inc., phone number (361) 949-2988. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/15/2010. Redacted Transcript Deadline set for 12/25/2010. Release of Transcript Restriction set for 2/22/2011. (ml) (Entered: 11/26/2010)
		* * * * *
11/24/10	22	APPEAL OF CONVICTION AND SENTENCING ENTERED BY MAGISTRATE JUDGE APPELLANT'S SUBMISSION OF MOTION TO DISMISS BRIEF. Filed by Defendant John Dennis Apel. (jp) (Additional attachment(s) added on 12/8/2010: # 1

DATE	DOCKET NUMBER	PROCEEDINGS
		Part 2, # 2 Part 3, # 3 Part 4) (jp). (Entered: 12/08/2010)
11/30/10	24	APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE APPELLANT'S SUBMISSION OF TRANSCRIPTS filed by Defendant John Dennis Apel. (Attachments: # 1 Part 2, # 2 Part 3, # 3 Part 4, # 4 Part 5) (jp) (Entered: 12/10/2010)
		* * * * *
12/28/10	26	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: as to Defendant John Dennis Apel re: appeal 22. For the foregoing reasons, the Court AFFIRMS the convictions and sentence of Appellant John Dennis Apel, and the appeal is DISMISSED. (kbr) (Entered: 12/28/2010)
1/5/11	27	NOTICE OF APPEAL OF CONVICTION AND SENTENCE; CONTINUANCE OF PROCEEDING IN FORMA PAUPERIS; AND MOTION FOR APPOINTMENT OF COUNSEL TO APPELLATE COURT (Interlocutory) filed by Defendant John Dennis Apel re MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: as to Defendant John Dennis Apel re: appeal 22. For the foregoing reasons, the Court AFFIRMS the convic-

DATE	DOCKET NUMBER	PROCEEDINGS
		tions and sentence of Appellant John Dennis Apel, and the appeal is DISMISSED. (kbr) 26. Filed on: 12/28/2010; Entered on: 12/28/2010; Filing Fee. Waived. See document number 8. cc: John Dennis Apel, pro se; United States Attorney. (lr) (Entered: 01/06/2011)

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION-LOS ANGELES)

Docket No. 2:10-cr-00869-JFW-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN DENNIS APEL, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/28/10	2	CENTRAL VIOLATIONS BUREAU proceedings file for CVB Citation Number: CC-21 2576523. Proceedings held before Magistrate Judge Rita C Federman prior to the filing of criminal case. (gk) (Entered: 08/05/2010)
7/28/10	3	NOTICE OF APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE to District Court by Defendant John Dennis Apel. Appeal taken from case Rita Coyne Federman. (gk) (Entered: 08/05/2010)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/1/10	9	APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE OPENING BRIEF. Filed by Defendant John Dennis Apel. (jp) (Entered: 10/05/2010)
10/25/10	10	BRIEF Filed by Plaintiff USA as to Defendant John Dennis Apel (Attachments: # 1 Exhibit EXHIBIT 1-3) (McCaslin, Sharon) (Entered: 10/25/2010)
11/5/10	24	APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE APPELLANT'S REPLY to Brief 10, filed by Defendant John Dennis Apel. (jp) (Entered: 12/10/2010)
		* * * * *
11/24/10	14	TRANSCRIPT filed as to Defendant John Dennis Apel for proceedings held on 7-15-10 9:12 a.m.. Court Reporter/ Electronic Court Recorder: Exceptional Reporting Inc., phone number (877) 670-7774. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of

DATE	DOCKET NUMBER	PROCEEDINGS
		this date. Redaction Request due 12/15/2010. Redacted Transcript Deadline set for 12/25/2010. Release of Transcript Restriction set for 2/22/2011. (ha) (Entered: 11/24/2010)
		* * * * *
11/24/10	16	TRANSCRIPT filed as to Defendant John Dennis Apel for TRIAL proceedings held on 7/15/10 10:18am and 1:40pm. Court Reporter/Electronic Court Recorder: Exceptional Reporting Services, Inc., phone number (361) 949-2988. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/15/2010. Redacted Transcript Deadline set for 12/25/2010. Release of Transcript Restriction set for 2/22/2011.(ml) (Entered: 11/26/2010)
		* * * * *
11/24/10	18	TRANSCRIPT filed as to Defendant John Dennis Apel for TRIAL proceedings held on 7/15/10 2:08pm and 2:58pm. Court Reporter/Electronic

DATE	DOCKET NUMBER	PROCEEDINGS
		Court Recorder: Exceptional Reporting Services, Inc, phone number (361) 949-2988. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 12/15/2010. Redacted Transcript Deadline set for 12/25/2010. Release of Transcript Restriction set for 2/22/2011.(ml) (Entered: 11/26/2010)
		* * * * *
11/24/10	23	APPEAL OF CONVICTION AND SENTENCING ENTERED BY MAGISTRATE JUDGE APPELLANT'S SUBMISSION OF MOTION TO DISMISS BRIEF. Filed by Defendant John Dennis Apel (Attachments: # 1 Part 2, # 2 Part 3, # 3 Part 4). (jp) (Entered: 12/08/2010)
11/30/10	25	APPEAL OF CONVICTION AND SENTENCE ENTERED BY MAGISTRATE JUDGE APPELLANT'S SUBMISSION OF TRANSCRIPTS filed by Defendant John Dennis Apel. (Attachments: # 1 Part 2, # 2 Part 3, # 3 Part 4, # 4 Part 5). (jp) (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		12/10/2010)
		* * * * *
12/28/10	27	MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: as to Defendant John Dennis Apel re: appeal 23. For the foregoing reasons, the Court AFFIRMS the convictions and sentence of Appellant John Dennis Apel, and the appeal is DISMISSED. (kbr) (Entered: 12/28/2010)
1/5/11	28	NOTICE OF APPEAL OF CONVICTION AND SENTENCE; CONTINUANCE OF PROCEEDING IN FORMA PAUPERIS; AND MOTION FOR APPOINTMENT OF COUNSEL TO APPELLATE COURT (Interlocutory) filed by Defendant John Dennis Apel re MINUTES OF IN CHAMBERS ORDER by Judge John F. Walter: as to Defendant John Dennis Apel re: appeal 23. For the foregoing reasons, the Court AFFIRMS the convictions and sentence of Appellant John Dennis Apel, and the appeal is DISMISSED. (kbr) 27. Filed on: 12/28/2010; Entered on: 12/28/2010; Filing Fee. Waived. See document number 8. cc: John Dennis Apel, pro se; United States Attorney. (lr) (Entered: 01/06/2011)
		* * * * *

DEPARTMENT OF THE AIRFORCE
EASEMENT FOR ROAD OR STREET

VANDENBERG AIR FORCE BASE
ON.....
SANTA BARBARA COUNTY, CALIFORNIA

NO. DA-04-353-ENG-8284

THE SECRETARY OF THE AIR FORCE, under and by virtue of the authority vested in him by Title 10, United States Code, Section 2668, having found that the granting of this easement will not be against the public interest, hereby grants to the COUNTY OF SANTA BARBARA, a political subdivision of the State of California,

hereinafter designated as the grantee, an easement for a right-of-way for a road or street over, across, in, and upon lands of the United States at the location shown in red on Exhibit attached hereto and made a part hereof, and more particularly described as follows: located at Vandenberg Air Force Base, Santa Barbara County, California, identified as Units J and K, containing approximately 189.74 acres and 85.97 acres, respectively, more particularly described in Exhibit A, dated 19 June 1962 and in Exhibit B, dated 12 July 1968 both exhibits being attached hereto and made a part hereof.

Containing a total of approximately 275.71 acres, including portions thereof within existing roads.

THIS EASEMENT is granted subject to the following conditions:

1. The construction, use, and maintenance of said road or street, including culverts and other drainage facilities, shall be performed without cost or expense to the United States, under the general supervision and subject

to the approval of the officer of the Air Force having immediate jurisdiction over said premises, hereinafter designated as "said officer".

2. The grantee shall at all times maintain said road or street in good condition and shall promptly make all repairs thereto needed to preserve a smooth-surface highway.

3. Any property of the United States damaged or destroyed by the grantee incident to the use and occupation of the said premises shall be promptly repaired or replaced by the grantee to the satisfaction of the said officer, or in lieu of such repair or replacement the grantee shall, if so required by said officer, pay to the United States money in an amount sufficient to compensate for the loss sustained by the United States by reason of damages to or destruction of Government property.

4. The use and occupation of said lands of the United States for the purposes authorized by this instrument shall be subject to such rules and regulations as the said officer may prescribe from time to time in order to properly protect the interests of the United States.

5. The United States shall in no case be liable for any damages or injuries to the said road or street which may be caused by or result from any operations undertaken by the Government, and no claim or right to compensation shall accrue from such damages or injuries.

6. The United States reserves the right to make such connections between the road or street herein authorized and roads and streets on said lands as the said officer may from time to time consider necessary, and also reserves to itself rights-of-way for all purposes across, over, and/or under the right-of-way hereby granted; provided, however,

that such rights shall be used in a manner that will not create unnecessary interference with the use and enjoyment by the grantee of said right-of-way for highway purposes.

7. It is to be understood that this instrument is effective only insofar as the rights of the United States in the property over which the said road or street is to be extended are concerned; and that the grantee shall obtain such permission as may be necessary on account of any other existing rights.

8. All or any part of such right-of-way herein granted may be terminated by the Secretary of the Air Force for failure to comply with any or all of the terms or conditions of this grant, or for (illegible) for a two-year period or abandonment of rights granted herein.

9. It is understood that the provisions of Conditions Nos. 1 and 6, supra, shall not abrogate or interfere with any agreements or commitments made or entered into between the grantee and any other agency of the United States with regard to financial aid to the grantee in connection with the construction, maintenance, or repair of the road or street described herein.

10. The United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the use and occupation of the said premises, nor for damages to the property of the grantee, ~~or for injuries to the person of the grantee (of an individual)~~, nor for damages to the property or injuries to the person of the grantee's officers, agents, servants, or employees, or others who may be on said premises at their invitation or the invitation of any one of them, arising from or incident to governmental activities, ~~and the grantee shall hold the United States harmless from any and all such claims~~.

11. The United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the construction, maintenance, and use of said road or street.

12. Prior to execution of this easement, the granting clause and Condition No. 10 were revised, and Condition No. 12 was added.

This easement is not subject to Title 10, United States Code, Section 2662.

IN WITNESS WHEREOF I have hereunto set my hand by authority of the Secretary of the Air Force this 20th *day of* Aug., *1962.*

/s/ JOHN J. SHIPLEY
JOHN J. SHIPLEY
Chief, Real Estate Division
U.S. Army Engineer District,
Los Angeles
Authorized Representative
Chief of Engineers

[SEAL OMITTED]

State of California
GOVERNOR'S OFFICE
SACRAMENTO 95514

WHEN RECORDED MAIL TO:
Department of Transportation
P.O. BOX L
San Luis Obispo, CA 93406

July 21, 1981

[Oct. 5, 1981]

Mr. Joseph C. Zengerle
Assistant Secretary of the Air Force
Manpower, Reserve Affairs and Installations
Department of the Air Force
Washington, D.C. 20330

Dear Mr. Zengerle:

Thank you for your letter in which you requested the State of California to accept relinquishment of legislative jurisdiction of the six parcels of land located within Vandenberg Air Force Base and used by the State of California and the County of Santa Barbara for road purposes.

Easement Nos. DA-04-353-ENG-8284 and DA-04-353-ENG-9802 granted rights-of-way to the County of Santa Barbara and Easement Nos. DA-04-353-ENG-9046, DA-04-353-ENG-9812, NOy(r) 59650 and NOy(r) 62873 granted rights-of-way to the State of California. Additionally, a portion of Lompoc Casmalia Road not included in other rights-of-way is included since the road was in existence prior to acquisition by the United States. These parcels

are more particularly described in the attached land description (Exhibit A) and depicted in the attached map (Exhibit B).

The State of California and the County of Santa Barbara have accepted conveyance of the lands for highway purposes and in accordance with our Streets and Highways Code. I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power vested in me by Section 77.5 of the Streets and Highways Code, hereby accept such legislative jurisdiction as necessary to permit the United States and the State of California to exercise concurrent jurisdiction over the easement areas and that portion of Lompoc Casmalia Road not within any easement area.

Sincerely,

/s/ EDMUND G. BROWN JR.
EDMUND G. BROWN JR.
Governor

EXHIBIT "A"

LAND DESCRIPTION

Six parcels of land lying within Vandenburg Air Force Base, situated in Santa Barbara County, State of California, more particularly described as follows:

PARCEL 1

All of the lands lying within the right of way granted to the County of Santa Barbara by Department of the Air Force, Road or Street Easement No. DA-04-353-ENG-8284, for San Antonio Road and a portion of Vandenberg Boulevard, as described in that certain deed recorded in Book 1947, at Page 782, Official Records of said County.

PARCEL 2

All of the lands lying within the right of way granted to the County of Santa Barbara by Department of the Air Force, Road or Street Easement No. DA-04-353-ENG-8284, for the certain portion of Lompoc-Casmalia Road, as described in that certain deed recorded in Book 1947, at Page 785, Official Records of said County.

PARCEL 2-A

All of the lands lying within a road right of way 100 feet in width, lying 50 feet on each side of the following described centerline:

BEGINNING at Engineer's Station 380 + 21.62 of the surveyed centerline of that certain portion of Lompoc-Casmalia Road as described in Book 482, at Page 288, Official Records of said County, said point of beginning also being the point of intersection of the centerlines of

California Boulevard and said Lompoc-Casmalia Road, thence northwesterly, northerly, and northwesterly along the centerline of the existing pavement on said Lompoc-Casmalia Road to the intersection of said road with the northerly boundary line of Vandenberg Air Force Base, southerly of the town of Casmalia, and the end of the herein described centerline; centerline of said pavement shall be determined by dividing the width of existing pavement by two.

PARCEL 3

All of the lands lying within the rights of way granted to the County of Santa Barbara by Department of the Air Force, Road and Street Easement No. DA-04-353-ENG-9802 for that certain portion of Vandenberg Boulevard as described in that certain deed recorded in Book 2174, at Page 624, of Official Records of said County.

PARCEL 4

All of the lands lying within the freeway rights of way granted to the State of California by Department of the Air Force, Road or Street Easements No. DA-04-353-ENG-9046 and No. DA-04-353-ENG-9812, for State Highway 1, as described in those certain deeds recorded in Book 2056, at Page 1007, and Book 2166, at Page 613, Official Records of said County.

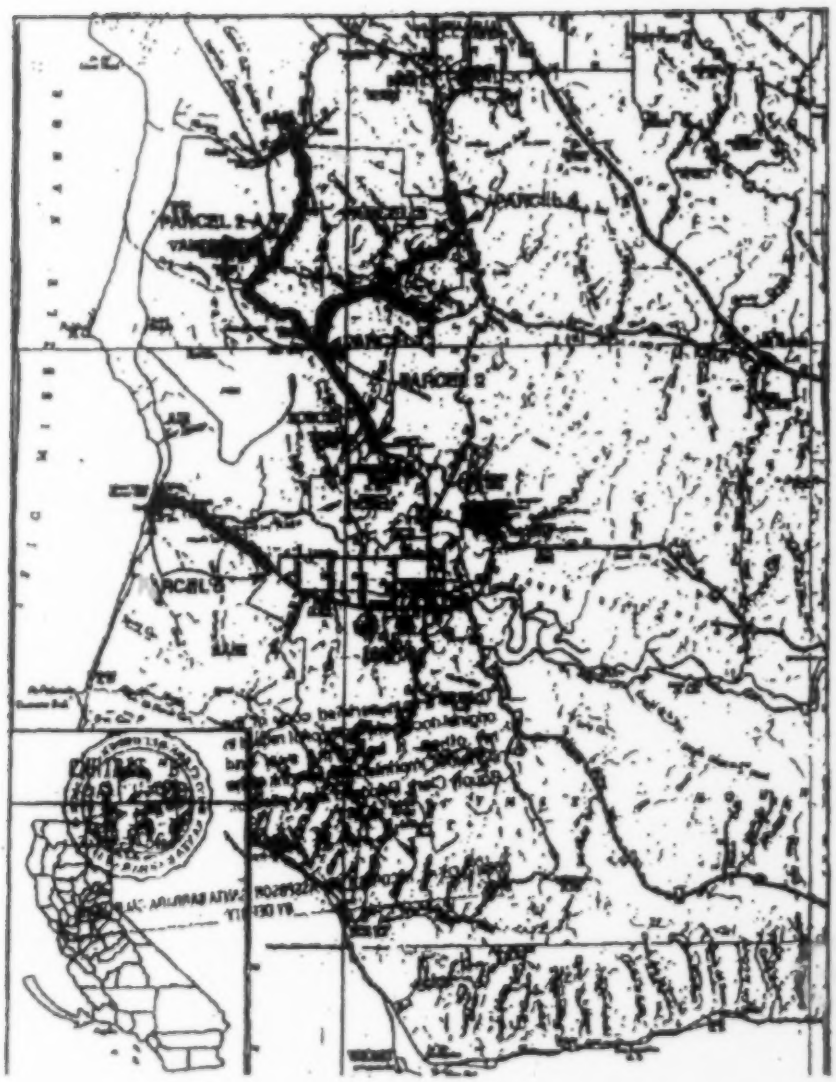
PARCEL 5

All of the lands lying within the rights of way granted to the State of California by Department of the Navy, Road or Street Easements No. NOy(R)-67781, No. NOy(R)-59650 and No. NOy(R)-62873, for those certain portions of State Highway 246, as described in those certain deeds recorded in Book 1781, at Page 68, Book 1897, at Page 565, and Book 1932, at Page 971, all Official Records of said County.

END OF DESCRIPTION

PREPARED JUNE 26, 1981 BY TECHNICAL SERVICES UNIT, ROY MINNICK, SUPERVISOR.

81-40910



UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 88-05627-AWT (Bx)

MARILYN ANN FAHRNER, HARVEY GREEN, EDWARD VAN VALKENBURGH, CARLA CARNEY [NEE PEDERSON], ET AL., PLAINTIFFS

v.

COLONEL RONALD D. OLIVERIO, BASE COMMANDER OF VANDENBERG AIR FORCE BASE; UNITED STATES AIR FORCE, AN AGENCY OF THE UNITED STATES, DEFENDANTS

[Filed: May 8, 1989]

STIPULATION FOR COMPROMISE SETTLEMENT AND ORDER [OF DISMISSAL]

IT IS HEREBY STIPULATED between plaintiffs and defendants, by and through their respective attorneys, as follows:

Plaintiffs and defendants do hereby agree and stipulate to settle and compromise the above-entitled action on the terms indicated herein.

1. All letters issued to plaintiffs pursuant to 18 U.S.C. § 1382 barring them from Vandenberg Air Force Base and from use of roads outside the gates of Vandenberg Air Force Base, but inside the legal boundaries of the Base, will be rescinded as of the effective date of this Stipulation.

All outstanding 18 U.S.C. § 1382 citations pending against plaintiffs shall be deemed withdrawn as of the effective date of this Stipulation.

2. The fence at the two western corners of the intersection at the Main Gate (Santa Maria Gate) has been removed.

3. All physical evidence taken by military personnel at the Main Gate, if still in the possession of the Air Force, will be returned to plaintiffs. Plaintiffs will be permitted to review all photographs and videotapes of plaintiffs at the Main Gate taken by military personnel. Copies of all photographs and videotapes will be provided to plaintiffs at their request and at their expense.

4. The attached policy statement is incorporated by reference herein and will be issued as of the effective date of this Stipulation.

5. This agreement and Stipulation shall not constitute an admission of liability or fault on the part of defendants, or on the part of any of their agents or employees.

6. In consideration of the terms set forth above, plaintiffs hereby agree to the dismissal of the above action with prejudice. The parties shall each bear their own costs and attorney's fees.

This Stipulation for Compromise Settlement is made subject to the approval of this Court.

DATE: [Apr. 1, 1989]

/s/ EDWARD VAN VALKENBURG
EDWARD VAN VALKENBURG,
Plaintiff

DATE: [Apr. 1, 1989.]

/s/ MARILYN ANN FAHRNER
MARILYN ANN FAHRNER,
Plaintiff

DATE: Mar. [28], 1989.

/s/ RICHARD C. SOLOMON
RICHARD C. SOLOMON
Attorney for Plaintiffs

DATE: [Apr. 5], 1989.

/s/ HARVEY GREEN
HARVEY GREEN,
Plaintiff

DATE: [Apr. 7], 1989.

/s/ CARLA M. CARNEY
CARLA CARNEY (nee Peterson)

DATE: [4/24], 1989

/s/ KEN FALSTROM
KEN FALSTROM
Attorney for Plaintiffs

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

DATE: [May 2], 1989

/s/ CAROL A. SOBEL
CAROL A. SOBEL
Attorney for Plaintiffs

DATE: [May 3], 1989

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ SUZETTE CLOVER
SUZETTE CLOVER
Assistant United States Attorney
Attorneys for Defendants

ORDER PERMITTING FILING OF STIPULATION FOR COMPROMISE SETTLEMENT

The above stipulation may be filed. Plaintiffs' [action] is hereby dismissed with prejudice. [No costs.]

DATED: [May 6, 1989]

/s/ A. WALLACE TASHIMA
UNITED STATES DISTRICT JUDGE

UNITED STATES AIR FORCE

VANDENBURG AIR FORCE BASE

Statement of Policy

People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force Base, California. The Air Force is obligated to insure that peaceful protests do not result in unsafe vehicle and people congestion around the Main Gate. If necessary, restrictions may be placed on peaceful protestors who encumber the roadways or engage in activities which can result in unsafe conditions for themselves or others. Protest demonstrations may be curtailed in this area when they materially interfere with or have a significant impact on the conduct of the military mission of the U.S. Air Force.

/s/ RONALD D. OLIVERIO
RONALD D. OLIVERIO, Colonel, USAF
Commander, 4392 Aerospace Support Wing

21 Feb. 1989
DATE

[SEAL OMITTED]

DEPARTMENT OF THE AIR FORCE
30TH SPACE WING (AFSPC)

[Oct. 23, 2008]

MEMORANDUM FOR THE GENERAL PUBLIC

FROM: 30 SW/CC

SUBJECT: Closed Base, Vandenberg Air Force Base

1. Pursuant to my authority under Title 50, United States Code, Section 797 (50 U.S.C. § 797), and Title 32, Code of Federal Regulations, part 809a (32 C.F.R. § 809a), I hereby declare that Vandenberg Air Force Base, California, is a closed base. Non-military and non-DoD personnel are not to enter the installation without the express permission of the Installation Commander or his designee.

2. The roadway easements through Vandenberg Air Force Base have limited uses as provided in the county/state easement granted by the United States; such use is limited to road maintenance and vehicular travel activity through the base. Use and occupation of the area is for these purposes only, and is subject to any rules and regulations the Installation Commander may prescribe to properly protect the interests of the United States. Activities not otherwise expressly permitted in these areas may be deemed to be trespassing upon Vandenberg Air Force Base property.

/s/ DAVID J. BUCK
DAVID J. BUCK
Colonel, USAF
Commander

[SEAL OMITTED]

FACT SHEET

U.S. Air Force Fact Sheet
PROTEST ADVISORY

PROTEST ADVISORY

Pursuant to 50 U.S.C., Section 797 and 32 C.F.R., part 809a, be advised that Vandenberg Air Force Base is a "Closed" installation. Non-military and non-Department of Defense personnel will not enter without authority or permission by the installation commander.

All protest activities must be coordinated and scheduled with base Public Affairs and 30th Security Forces at least two (2) weeks in advance to ensure the implementation of adequate safety and security measures prior to commencement. Any protest activity not adequately coordinated and scheduled will not be permitted. Any protest activity the installation is unable to support will be denied. Anyone failing to vacate installation property upon advisement from Security Forces will be cited for trespass pursuant to 18 USC Section 1382 and/or for violation of a security regulation or order pursuant to 50 U.S.C. Section 797 if such person also fails to abide by the protest advisory rules/regulations.

Commander's "Closed Base Order"
Peaceful Protest Activity Policy Letter
Pepper Spray Fact Sheet

The installation commander has granted permission to peacefully protest in the area adjacent to the intersection of State Highway 1 and the Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force Base when such activity is adequately coordinated. The

painted green line and temporary fencing, as well as Highway 1 and the Lompoc-Casmalia Road, mark the boundaries for peaceful protest activity at this location. Activities other than peaceful protests in this area are not permitted and are specifically prohibited. Failure(s) to adhere to these parameters and vacate premises at the request of security forces will likely result in citation for trespass and/or a citation for a violation of defense property security regulations, which include violations of these advisory rules.

The following rules/regulations apply:

- No structures or equipment of any kind may be erected, constructed, or affixed, even temporarily, anywhere on the installation including the area referenced.
- No weapons
- No fireworks
- No skates
- No bicycles
- No motorized recreational items
- No solicitation or distribution of any materials including pamphlets, leaflets, handouts, etc.
- No containers, including backpacks and coolers larger than one foot square (small Playmate-type coolers are okay)
- Baby bags may be used when an infant or child under 3 years old is present
- No masks—Exception: Masks may be worn when required by a medical doctor. The wearer must show the doctor's order in writing and provide the doctor's contact phone number for confirmation.

- All locations on installation, including the authorized peaceful protest area, are subject to search—Checkpoints may be set up

- Everyone must possess valid state or U.S. federal government-issued-identification (ID) and immediately present it upon request.

Parking: There are 44 parking spaces at Vandenberg Middle School for use during coordinated and scheduled peaceful protests during weekends/outside school hours. Such spaces are otherwise unavailable during school hours unless you obtain permission from LUSD, which must be shown in writing. Two of those spaces are designated for handicapped parking. Once the parking lot is full, no other vehicles will be allowed to park in that lot. The parking of vehicles on highways and roads adjacent to and transecting Vandenberg Air Force Base is strictly prohibited. Vehicles parked upon Highway 1, Lompoc/Casmalia Road, or Brown Road, WILL BE TOWED (California Vehicle Code 22651) by USAF Security Forces or state or county authorities.

Barment from Vandenberg AFB: If you are currently barred from Vandenberg AFB, there is no exception to the barment permitting you to attend peaceful protest activity on Vandenberg AFB property. If you are barred and attend a protest or are otherwise found on base, you will be cited and detained for a trespass violation due to the non-adherence of the barment order.

Detention: If you are detained for a trespass violation and/or for a failure to adhere to these parameters and rules of peaceful protest, please be advised that the following procedures will likely be followed, depending upon the number of violators:

- You will be photographed and taken to a processing area.

- A criminal records check will be done and a check to determine if you have been previously barred from entering Vandenberg Air Force Base.

- You will receive an official letter barring you from entering Vandenberg Air Force Base.

- If you are detained without valid ID, you will be detained until valid ID is presented.

- If you fail or otherwise refuse to present valid ID, you may be also cited for a violation of a security regulation/ order and trespass.

- If you present valid ID and are released, you will be transported to Ryon Memorial Park at the corner of O Street and Ocean Ave/Hwy 246 in Lompoc.

- If it is determined that you have an outstanding warrant, you will be turned over to the appropriate authorities responsible for executing the warrant, or you will be transported to a federal facility and detained until arraigned before a federal magistrate.

Amenities: Vandenberg AFB will provide portable toilets for these scheduled peaceful protests upon request depending upon the number of persons expected to be present.

Scheduling and Coordination: Notify 30th Space Wing Public Affairs at (805) 606-3595 and 30th Security Forces Squadron/S2 office at (805) 606-4661 at least two weeks in advance with the date, time and expected number of participants.

Point of Contact

30th SW Public Affairs
(805) 606-3595
DSN 276-3595

30th Security Forces Squadron
(805) 606-4661
DSN: 276-4661

[SEAL OMITTED]

DEPARTMENT OF THE AIR FORCE
30TH SPACE WING (AFSPC)

[Oct. 23, 2008]

MEMORANDUM FOR THE GENERAL PUBLIC

FROM: 30 SW/CC

SUBJECT: Limited Permission for Peaceful Protest Activity Policy

1. Vandenberg AFB is a closed base and non-military and non-DoD personnel are prohibited from entering the installation without the express permission of the installation commander or his/her designee. However, I, as the installation commander, have granted limited permission for personnel, who are not otherwise authorized base access and who have not been previously barred from the installation, to peacefully protest in a designated area adjacent to the intersection of State Highway 1 and Lompoc-Casmalia Road (Santa Maria Gate), so long as such activity is adequately coordinated and scheduled with Public Affairs. The painted green line on the road surface and temporary fencing, as well as Highway 1 and the Lompoc-Casmalia Road, mark the boundaries for peaceful protests.

2. Activities other than such coordinated and scheduled peaceful protests are not permitted and are specifically prohibited. No structures or equipment of any kind may be erected, constructed, or affixed, even temporarily, anywhere on the installation, including the area referenced.

3. If, for any reason I or any subsequent installation commander deems it necessary, such permission may be withdrawn. In the event this was to occur, no protest activity

would be permitted at any time until further notice from the installation commander. Vandenberg AFB is a closed base and the installation commander at all times has retained authority and control over who may access the installation, including access to roadway easements for purposes other than traversing by vehicle through the installation.

4. Please address any questions or requests for deviations from this policy to my Public Affairs Office at (805) 606-3595.

/s/ DAVID J. BUCK
DAVID J. BUCK
Colonel, USAF
Commander

[SEAL OMITTED]

DEPARTMENT OF THE AIR FORCE
30TH SPACE WING (AFSPC)

MEMORANDUM FOR JOHN D. APEL

FROM: 30 SW/CO
747 Nebraska Ave, Suite A200
Vandenberg AFB CA 93437-6261

SUBJECT: Barment Order Not to Enter or Reenter Vandenberg AFB (VAFB) Dated 22 October 2007

1. Numerous attempts have been made to send the attached written order to your only known address. However, it appears you have refused to personally accept the written order dated October 22, 2007. On October 3, 2009 VAFB Security Forces personnel (SFS personnel) orally notified you that this written order was in effect. To ensure you possess actual knowledge of your debarment, it is being personally served on you. Be advised that you will be cited and prosecuted for trespass pursuant to 18 U.S.C. § 1382 if you violate the 22 October 2007 order and this supplemental letter, and return to base property.

2. You have been convicted twice for violating federal criminal laws on VAFB property. On 14 March 2003 you trespassed onto VAFB property and vandalized VAFB property by throwing blood onto the VAFB sign. You were convicted and sentenced for these actions. On 4 April 2003 you were then barred by the installation Commander from entering the base for a period of three (3) years. On 19 May 2007 you were again detained and cited for trespassing on VAFB property during a scheduled protest, but only af-

ter SFS personnel had warned you several times that you needed to return to the designated protest area. SFS personnel also advised you at that time that if you did not return to the designated area you would be detained for trespassing, and be barred again from VAFB property. You refused to comply after several warnings, and in December 2008 you were convicted of this 19 May 2007 trespass. In August 2008, April 2009, October 2009, November 2009, and December 2009 you continued to enter VAFB property and continued to refuse to acknowledge receipt of the 22 October 2007 order.

3. You continue to refuse to adhere to the rules and guidelines that have been put in place by me to protect and preserve order and to safeguard the persons and property under my jurisdiction by failing to remain in the area approved by me for peaceful demonstrations pursuant to 40 U.S.C. § 797 and 32 C.F.R. § 809a.0-908a.11. You cannot be expected or trusted to abide by the protest guidance rules based upon this behavior. I consider your presence on this installation to be a risk and detrimental to my responsibility to protect and preserve order and to safeguard the persons and property under my jurisdiction. You are again ordered not to enter onto VAFB property, as provided in the October 22, 2007 order. The content and basis of that order is hereby incorporated by reference herein,

EXCEPT that your barment will be for a period of three (3) years from the date of this supplemental letter.

/s/ DAVID J. BUCK
DAVID J. BUCK
Colonel, USAF
Commander

Attached:
Barment Order, Dated 22 Oct. 2007

cc:
30 SFS/S5SR

1st Ind to 30 SW/CC, _____. Barment Order Not to Enter VAFB, Dated 22 Oct 07

(Print Name of Patrolman) [SRA Hurst, John]

MEMORANDUM FOR 30 SW/CC

CERTIFICATION

This is to certify that I [SRA Hurst, John], personally served a copy of the foregoing letter and attachment upon [Apel, John D.]; and orally advised [Apel, John D.] of the specific contents of this barment notification, including the attachment, on [31 JAN. 10] date. Subject has repeatedly refused to sign for receipt of this letter through the mail prior to this personal service.

[SEAL OMITTED] [SEAL OMITTED]

DEPARTMENT OF THE AIR FORCE
30TH SPACE WING (AFSPC)

[Oct. 22, 2007]

MEMORANDUM FOR JOHN D. APEL

FROM: 30 SW/CC
747 Nebraska Ave, Suite A200
Vandenberg AFB CA 93437-6261

SUBJECT: Barment Order Not To Enter or Reenter Vandenberg AFB Property

1. It has come to my attention that on 19 May 2007, you were detained and cited for trespassing onto Vandenberg Air Force Base property (VAFB property) during a scheduled protest. You were warned several times by Security Forces Members that you were trespassing onto VAFB property and that you needed to return to the designated protesting area. Additionally, you were told by Security Forces Members that if you did not return to the designated protest area, you would be detained for trespassing and barred from Vandenberg Air Force Base (VAFB). It was also brought to my attention that you were previously detained and cited by Security Forces Personnel on 14 Mar 2003 for trespassing onto VAFB property and vandalizing a VAFB sign by throwing blood onto the sign. For that offense, you appeared in U.S. District Court in Santa Barbara, CA, and you were sentenced to two months of confinement. On 4 Apr 2003, you were also barred by the Installation Commander from entering the base for a period of three years. You have clearly refused to remain in the area approved by me for nonpartisan, peaceful demonstrations

pursuant to 32 C.F.R. § 809a.4 and have refused to adhere to warnings of Security Forces.

2. Based upon your obstructive actions, previous criminal violations, and continued failure to comply with Security Forces personnel during protests, I consider your continued presence on this installation to be a risk and detrimental to my responsibility to protect and preserve order, and to safeguard the persons and property under my jurisdiction (32 C.F.R. § 809a.2(b)). Effective immediately, you are ordered **not** to enter onto VAFB, except to "traverse", meaning to travel to/from Lompoc and Santa Maria on Hwy 1 and to/from Lompoc and Amtrak's Surf Station on Hwy 246, which passes through VAFB property. You are not authorized to deviate from these paved roadways onto VAFB property, which includes the San Antonio Camp Grounds, FAMCAMP and Surf Beach except for an emergency.

3. If you re-enter VAFB property in violation of this order, without having received prior written approval from me or my designee, you will be subject to detention by Security Forces personnel and prosecution by civilian authorities for a violation of Title 18 United States Code § 1382, Trespassing.

4. If you are entitled to medical treatment at the Vandenberg Clinic, you may enter Vandenberg AFB for the sole purpose of using said facility. To do so, you must present this letter to the entry controller at the installation entry point and obtain the appropriate visitor pass. You will be escorted to and from the clinic.

5. This order will remain in effect **permanently**. Any requests for access to VAFB or to modify or revoke this order must be made in writing. You must submit any such re-

quests to me through the Chief of Security Forces (30 SFS/SFAR), 108 Colorado Ave, Building 13675, Vandenberg AFB CA 93437.

/s/ STEPHEN M. TANOUS
STEPHEN M. TANOUS
Colonel, USAF
Commander

1st Ind. _____

MEMORANDUM FOR 30 SW/CC

This is to certify I, the undersigned, have received the foregoing barment order. I have read and understand the order. I understand that if I enter upon VAFB, in violation of this order, I may be prosecuted for violating 18 U.S.C. § 1382.

Received and signed the [31] day of [Jan., 2010.]

/s/ [Refused to Sign]
Signature

2nd Ind to 30 SW/CC, _____ Order Not to Enter or Reenter Vandenberg AFB

30 SFS/S5SR

MEMORANDUM FOR 30 SW/CC

CERTIFICATION

This is to certify that I [SRA Hurst, John], personally served a copy of the foregoing letter upon [Apel, John D.], on this date [31 Jan. 10].

[CERTIFIED MAIL RECEIPT OMITTED]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case Nos. 2:10-cr-830-JFW
2:10-cr-831-JFW
2:10-cr-869-JFW

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN DENNIS APEL, DEFENDANT

DECLARATION OF SCOTT DAVID FINA

I, Scott David Fina, declare as follows:

1. On April 5, 2010, by mailed letter, I made a California Public Records Act request to David Whitehead, Director of Public Works for the City of Santa Maria, California, concerning the location of the regularly scheduled stops of the Breeze Bus at the Santa Maria-Highway 1 Gate at Vandenberg Air Force Base. In response to this request, I received a letter by mail from Austin O'Dell, Transit Services Manager for the Department of Public Works for the City of Santa Maria, dated April 9, 2010, and an attachment titled Attachment A with a Google satellite picture of the location of the regularly scheduled bus stop of the Breeze Bus at the Santa Maria-Highway 1 Gate of Vandenberg Air Force Base.

2. On June 24, 2010, I made scanned copies of each of the above mentioned documents and included them in the Motion to Dismiss Citations submitted by defendant John Dennis Apel, which I forwarded to the U.S. District Court for the Central District of California.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 24th day of June, 2010 at my residence at 4430 Old Mill Court, Santa Maria, California.

/s/ SCOTT DAVID FINA
SCOTT DAVID FINA

Scott Fina, Ph.D.
4430 Old Mill Court
Santa Maria, CA 93455
(805) 937-1296/scottfina@gmail.com

Apr. 5, 2010

David Whitehead
Director of Public Works-City Engineer
City of Santa Maria
110 Pine Street
Santa Maria, CA 93458

Cc: Colonel David Buck
Commander, Vandenberg Air Force Base

Dear Mr. Whitehead:

Under the California Public Records Act (CA Govt. Code 66250-6276.48) and the U.S. Federal Freedom of Information Act (5 U.S.C. Sec. 552), I am requesting the following:

1. A statement on the exact location of the regularly scheduled stops by the Breeze Bus at the Santa Maria-California Highway 1 Gate of Vandenberg Air Force Base in effect on January 31, 2010, specifically whether the bus stops to load and unload passengers inside the Santa Maria-California Highway 1 Gate entrance or outside the gate entrance on California Highway 1, and the specific scheduled site of the bus stop relative to the Vandenberg Air Force Base Visitor Control Center (including the distance and direction from the Visitor Control Center).

2. All written documentation in effect on January 31, 2010, originating from officials of the City of Santa Maria or the Vandenberg Air Force Base, that address the requirement of passengers sitting on, waiting for, or exiting the Breeze Bus to present government issued identification to military security officials from Vandenberg Air Force Base.

Please respond in writing to me within 10 days of your reception of this request. In your response, kindly advise me of the estimated costs that I will be required to reimburse the city to meet this request, and the time required by the city to meet this request.

Sincerely,

/s/ SCOTT FINA
SCOTT FINA

[SEALS OMITTED]

CITY OF SANTA MARIA
ENGINEERING DIVISION

110 S. PINE ST. #101 (ON HERITAGE WALK) · SANTA MARIA, CA 93458-5082 · 805-925-0951, EXT. 225 · FAX 805-928-4995 · TDD 800-735-2929

DEPARTMENT OF PUBLIC WORKS Apr. 9, 2010

Scott Fina, Ph.D.
4430 Old Mill Court
Santa Maria, CA 93455

SUBJECT: **BREEZE BUS PUBLIC RECORDS REQUEST**

Below are the responses to your inquiry dated April 5, 2010:

1. A Statement on the exact location of the regularly scheduled stops by the Breeze Bus at the Santa Maria—California Highway 1 Gate of Vandenberg Air Force Base in effect on January 31, 2010, specifically whether the bus stops to load and unload passengers inside the Santa Maria—California Highway 1 Gate entrance or outside the gate entrance on California Highway 1, and the specific scheduled site of the bus stop relative to the Vandenberg Air Force Base Visitor Control Center (including the distance and direction from the Visitor Control Center).

   Response: The Breeze is a pubic transportation service between the Cities of Santa Maria and Lompoc, and Vandenberg Air Force Base. The Breeze has one

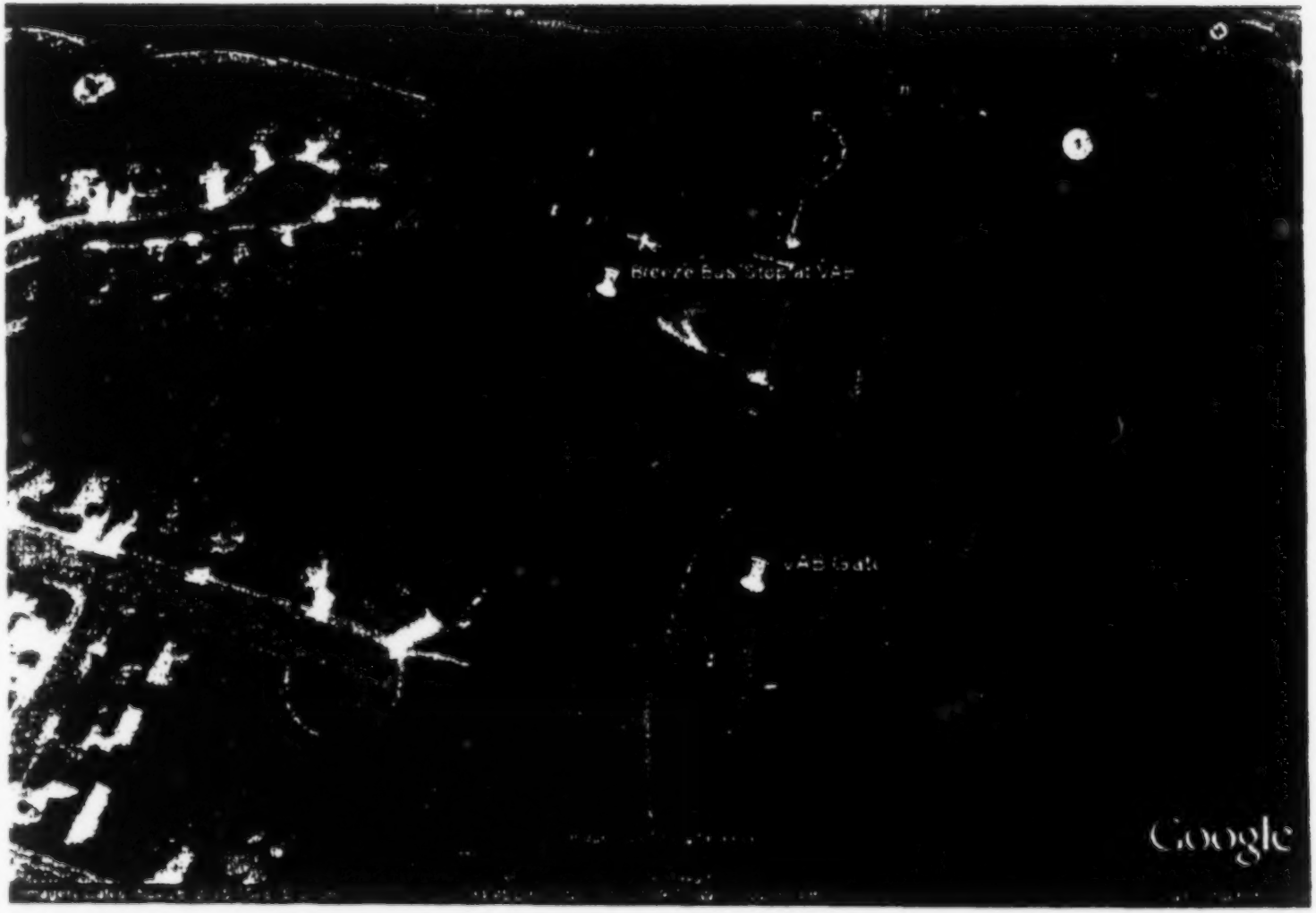
bus stop located behind the Visit Control Center outside the security gate. Please see Exhibit A.

2. All written documentation in effect on January 31, 2010, originating from officials of the City of Santa Maria or the Vandenberg Air Force Base, that address the requirement of passengers sitting on, waiting for, or exiting the Breeze Bus to present government issued identification to military security officials from Vandenberg Air Force.

   Response: There is no requirement and no documentation. The Breeze is available to the public and is not limited to government personnel.

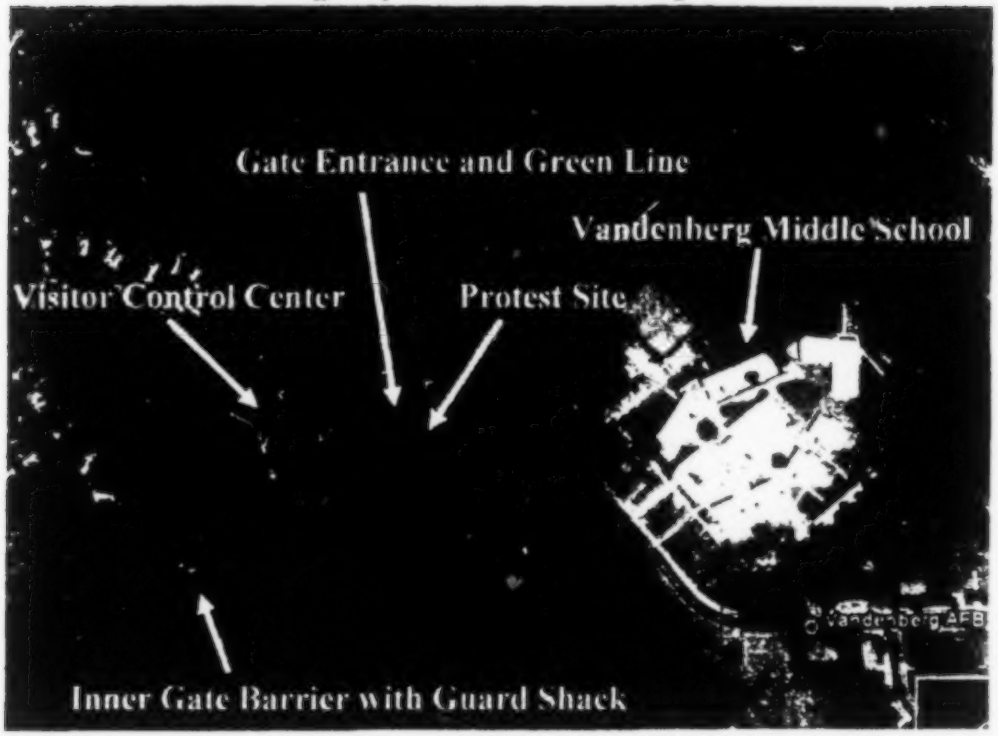
If you have any further questions regarding this matter, please contact me at (805) 925-0951, ext. 225.

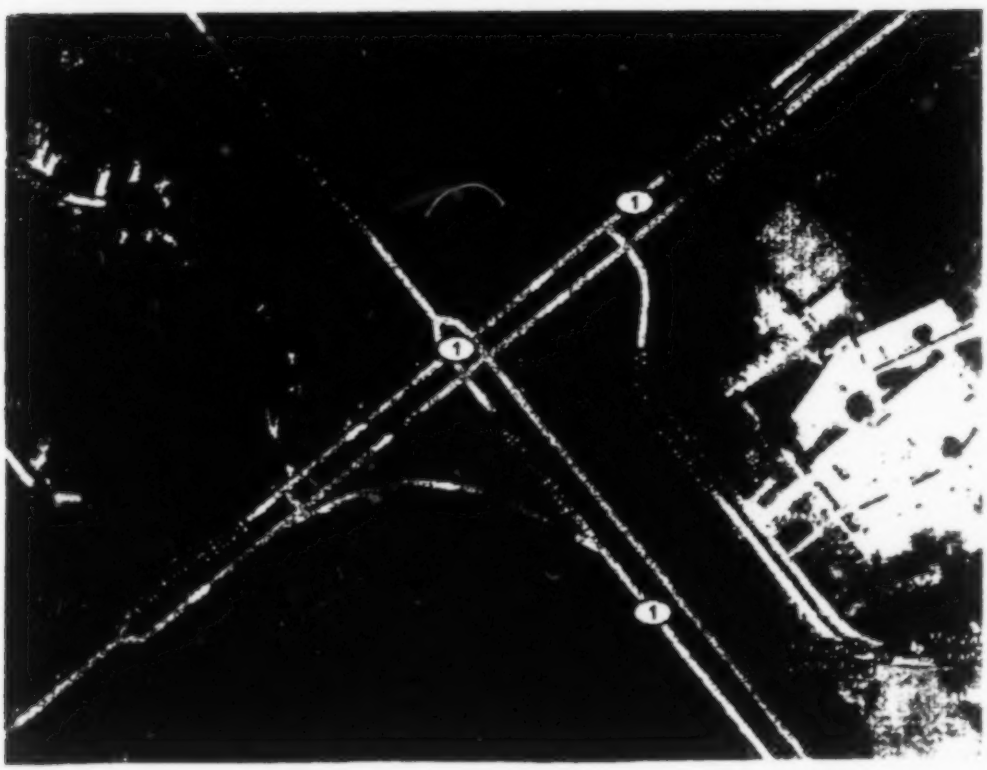
/s/ AUSTIN O'DELL
AUSTIN O'DELL
Transit Services Manager

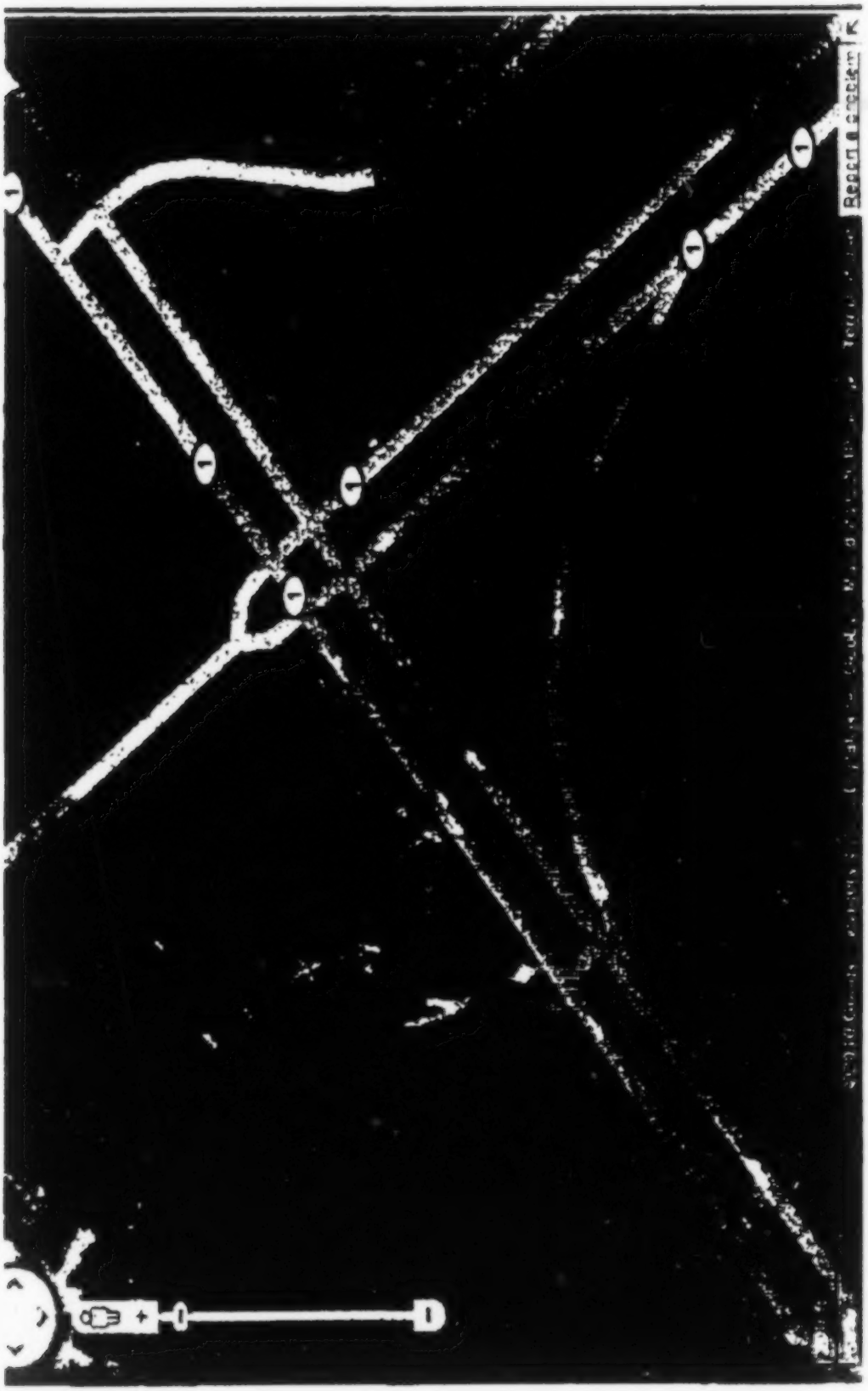


ATTACHMENT A

Santa Maria-Highway 1 Gate to Vandenberg Air Force Base







UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case Nos.: 2:10-CR-830-JFW
2:10-CR-831-JFW
2:10-CR-869-JFW

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN DENNIS APEL, DEFENDANT

CVB Case Nos: 1982007/1981283/2576523
Case Nos.: 2:10-CR-810-VBF
CVB 1981239
CVB 2576524

UNITED STATES OF AMERICA, PLAINTIFF

v.

MACGREGOR EDDY, DEFENDANT

Case Nos.: 2:10-TK-2006-UA
CVB 1982006

UNITED STATES OF AMERICA, PLAINTIFF

v.

STEPHEN M. KELLY, DEFENDANT

Santa Barabara, California
Thursday, July 15, 2010
(9:12 a.m. – 9:57 a.m.)

MOTION TO DISMISS

BEFORE THE
HONORABLE RITA COYNE FEDERMAN,
UNITED STATES MAGISTRATE JUDGE

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* * * * *

[6]

THE COURT: All right. Well, that sort of segues right into my next question, which is: Since this is a motion to dismiss, typically it's decided on facts that are not in dispute between the parties. So, of course, I'll have to hear from you as to the relevance of this, but does the Government object to me considering it, first?

CAPTAIN RIDLON: No, your Honor. Just to clarify, I think the police report relates to the day on which Ms. Eddy was served with notice of the barment rather than that. It may be also part and parcel of the barment letter, as well, but I think that was on the day she was served rather than actually the basis for the barment itself, your Honor.

(Pause)

CAPTAIN RIDLON: Actually, I stand corrected, your Honor. Ms. Swysen is correct.

THE COURT: All right. Let me, then, with the premise in mind that the motion to dismiss should be determined on facts that are not in dispute, let me just outline for everyone what facts I think are not in dispute

and that can be considered for the motion to dismiss, because if there is some issue about presenting evidence, then it may be more appropriate to have that evidence come in at the trial and have the motion decided at a later point today.

So, the facts that I've culled from the record that seem to be important to the motion to dismiss are as follows.

[7]

I have the order dated October, 2008, from the base commander designating the base as a closed base, and the statements that are made in that policy statement are provided as part of the record, and I don't think those are in dispute.

I have the stipulation for settlement in the *Farner* (phonetic) case, which has been provided, and I have considered the entirety of the statements in that stipulation.

We have the—what's the date on that document? I believe it's also 2008, statement by the commander. It's got a subject label of "Limited Permission for Peaceful Protest Activity," and that outlines the commander's policies on peaceful protests.

We have the statements made in the Protest Advisory Fact Sheet that's been provided by the parties.

And, in addition to that, there is some description provided and exhibits to support the description by Mr. Apel explaining that the location of the protest area at the intersection of Highway 1 and the main gate, the fact that the traffic on Highway 1 flows very freely without

interruption in that area, that there is a painted green line on the pavement to demarcate the boundary for the protests, that about 200 yards beyond that there is a guard shack and a barricade for formal entry into the base, and between the green line and the guard shack is a visitor control center and a public transit bus stop. And, as I understand it, the issue is framed in this [8] case in such a way because the defendants were attending peaceful protests, and at the time that they were at Vandenberg Air Force Base they stayed solely within the confines of the protest demonstration area.

I'm going to give everyone a chance to let me know if any of those facts need to be explored further or if I have any of them wrong, or—I am also going to give Ms. Swysen an opportunity to describe the additional exhibit and how that fits into the argument that's been made.

So, Ms. Swysen, I'll ask you to address that first.

MS. SWYSEN: Yes, your Honor.

This security forces blotter, which was generated by Vandenberg Air Force Base, describes the activities on August 13, 2008, which is the date where Ms. Eddy was served with the ban and bar letter which is the basis for the prosecution in this case. The ban and bar letter was attached as an exhibit to the Government's moving paper. I think it was Exhibit Number 8, and I anticipate it will be—I have made it, without objection, at trial, as well.

There is a line in that ban and bar letter stating—and I'm going to turn to the exhibit so I can be accurate—that on 13 August '08 you—meaning Ms. Eddy—were detained and cited for trespassing onto Vandenberg

Air Force Base property, VAFB property, during an unscheduled protest.

The reason I wanted to introduce this exhibit is [9] that, according to the records that were provided to me yesterday by the base, it was actually a scheduled protest, as is indicated in box number three and in the attached report, as well. And, so, I wanted that to be part of the record.

With regards to that October 13th, 2008, I would also like the Court to take judicial notice that even though Ms. Eddy was cited for two violations as a result of that incident, those two violations were dismissed upon motion of the Government on May 20, 2010, in front of this Court. The Government moved to dismiss the citation that was Number R3288641, and the Court on that day, on May 20, granted said motion. So, there was no criminal conviction as a result of those citation on October 13, 2008.

THE COURT: Okay. And, then, as to the facts, are there any other facts? Are you in agreement with the facts that I described that are at issue for this motion, and is there anything else that you believe needs to be explored in an evidentiary setting?

MS. SWYSEN: No; I think that the Court has listed the relevant facts, and I don't think that those are in dispute, at least not on our part.

THE COURT: All right.

Mr. Apel?

MR. APEL: I'm in agreement, your Honor.

THE COURT: Mr. Kelly?

[10]

MR. KELLY: Yes, that's fine. Thank you.

THE COURT: All right.

Then, Captain Ridlon for the Government?

CAPTAIN RIDLON: The facts as you described, your Honor, yes.

THE COURT: All right.

Then, based on that, that's the basis that I'll be using for considering the motion, and I have read all the cases that have been cited in the briefs that have been filed; and I will go back, then, to Ms. Swysen first, if you'd like to highlight anything in particular or if there is anything you wanted to add to your briefs.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case Nos.: 2:10-CR-831-JFW
CVB 1981283
2:10-CR-869-JFW
CVB 2576523

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN DENNIS APEL, DEFENDANT

Case Nos.: 2:10-CR-810-VBF
CVB 1981239
CVB 2576524

UNITED STATES OF AMERICA, PLAINTIFF

v.

MACGREGOR EDDY, DEFENDANT

Santa Barbara, California
Thursday, July 15, 2010
10:18 a.m. to 12:14 p.m.
1:40 p.m. to 1:59 p.m.

CVB TRIAL
BEFORE THE
HONORABLE RITA COYNE FEDERMAN,
UNITED STATES MAGISTRATE JUDGE

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[8]

* * * * *

THE COURT: All right, thank you; that's very helpful.

Captain Ridlon, would you like to call your first witness?

CAPTAIN HANEY: Captain Haney for the government

THE COURT: Captain Haney.

CAPTAIN HANEY: Yes, your Honor. The government would like to call Mr. Andrew Puckett.

(Pause)

THE COURT: Good morning, sir.

ANDREW PUCKETT, GOVERNMENT'S WITNESS, SWORN

THE CLERK: Please be seated.

(Andrew Puckett takes the witness stand)

THE CLERK: State your name for the record, spelling your last name.

THE WITNESS: Andrew Puckett, P-u-c-k-e-t-t.

THE CLERK: Thank you.

THE COURT: Good morning, sir.

THE WITNESS: Good morning.

THE COURT: All right, Captain, you may inquire.

CAPTAIN HANEY: Thank you.

[9]

DIRECT EXAMINATION

BY CAPTAIN HANEY:

Q. Mr. Puckett, can you please tell us your job description and where you work?

A. I'm a GIS technician community planner at the Vandenberg Air Force Base.

Q. And as a GIS technician, what are your job duties generally?

A. I do geographic mapping of facilities and assets out on the base.

Q. And how long have you been in that position?

A. I've been in that position for about seven years now.

Q. What type of training have you had for your job?

A. I've had specialized training from the application that I use, which is Esrayzark (phonetic) map, plus a variety of independent-type study courses, if you will, at Allen Hancock College.

Q. What type of information do you enter into the program that you were mentioning?

A. I enter geographic points and vector data based upon recorded surveys.

Q. So during your experience at Vandenberg Air Force Base, how often do you deal with the jurisdiction lines of the base?

A. In the last year I've dealt with them very heavily as a matter of fact.

[10]

Q. Are those points that you would generally enter into your program and study and survey?

A. Yes.

Q. So how familiar would you say you are with the jurisdiction lines of Vandenberg?

A. Probably better than most.

Q. Have you had an opportunity to work much with the property lines around Highway One that runs through Vandenberg Air Force Base?

A. Yeah; yes, I have.

Q. And to what extent have you had to deal with those lines?

A. Well, I've dealt with them in terms of real property and accounting for easements, if you will, and then also validating our base boundaries with approved surveys or recorded surveys.

Q. More specifically, have you had any experience with the jurisdiction lines of Highway One and the intersection of California Boulevard?

A. Yes, I have. Personally I have seen a number of surveys done at that location.

Q. And what do those surveys say generally about the type of jurisdiction that Vandenberg Air Force Base has at that intersection?

A. It shows that there is a line that's defined as a right-of-way, and it's understood that it is a joint jurisdictional area.

[11]

Q. So is that intersection at Highway One and California Boulevard within Vandenberg Air Force Base property?

A. Oh absolutely, yeah.

Q. Would you please pick up Government's Exhibit 4? I believe it should be sitting in front of you.

(Witness complies)

Q. Mr. Puckett, do you recognize that document?

A. Yes.

Q. How do you recognize it?

A. I've got a copy of this at my desk and I used it for a case; that was about a year ago I believe.

Q. And what is that document?

A. This is a right-of-way easement, if you will.

Q. What are the specific points that the easement covers?

A. This will cover a portion of road that traverses the base through Jesus Maria and defines pretty much the right-of-way up to that intersection.

Q. And what, from your experience, can you tell from that document? What does that tell us about the jurisdiction at the intersection of Highway One and California Boulevard?

A. I can see specific points in relation to a description of a said part of land. It also references another point that is familiar to me based upon the history of Camp Cook only.

Q. Okay. And so what does that document tell us generally? Who has jurisdiction through that intersection?

[12]

A. At this time I believe it was with the state of California.

Q. And that would be the joint jurisdiction that we've been discussing—

A . Yes.

Q. —that runs through that intersection?

CAPTAIN HANEY: Your Honor, may I have one moment?

THE COURT: Yes.

(Pause)

BY CAPTAIN HANEY:

Q. Mr. Puckett, based on that easement, who still has jurisdiction or who would you say has jurisdiction through that intersection

A. I would feel the U.S. government has jurisdiction, as do Highway Patrol and, potentially, sheriffs.

Q. So Vandenberg Air Force Base still maintains jurisdiction through that intersection?

A. Yes.

CAPTAIN HANEY: Your Honor, at this moment we'd move to admit Government's Exhibit 1 for identifi-

cation into evidence as—I'm sorry Government's Exhibit 4 for identification into evidence as Government's Exhibit 4.

THE COURT: Any objection from the defense?

MS. SWYSEN: No.

THE COURT: Mr. Apel?

[13]

MR. APEL: No.

THE COURT: All right, then that's admitted.

(Government's Exhibit Number 4 is received in evidence)

CAPTAIN HANEY: No further questions, your Honor.

THE COURT: All right, Ms. Swysen, would you like to question Mr. Puckett?

MS. SWYSEN: Yes, your Honor.

Good morning.

THE WITNESS: Hi; good morning.

CROSS EXAMINATION

BY MS. SWYSEN:

Q. I would like you to look at what has been marked—

MS. SWYSEN: And your Honor, with regards to the exhibits, could the Court find that the exhibits that were submitted by Mr. Apel are joint exhibits for both Ms. Eddy and Mr. Apel?

THE COURT: Yes, of course.

MS. SWYSEN: Okay.

THE COURT: And are there separate—Did you submit separate exhibits?

MS. SWYSEN: No, I did not submit separate exhibits.

THE COURT: All right, so we don't have duplicate labeling.

MS. SWYSEN: Yes, exactly.

THE COURT: Thank you.

[14]

BY MS. SWYSEN:

Q. I would like you to turn to Exhibit B; that should be in front of you.

MS. UNIDENTIFIED: On his left.

BY MS. SWYSEN:

Q. On your left.

A. Oh, I'm sorry.

(Witness complies)

Q. If you look through that exhibit, you will come upon a page that has two aerial photographs, and it's entitled Santa Maria Highway One gate to Vandenberg Air Force Base.

A. Uh-huh.

Q. And it has little arrows with difference location. Do you have that in front of you?

A. Yes, ma'am.

Q. Okay. Is that the area that you have been discussing, the intersection of Highway One and California Avenue?

A. Yeah, it's a small portion of a larger portion that I was discussing.

Q. Yes. So that's the portion, the intersection where there is a little blue square, is that the actual intersection we are discussing between Highway One and California Avenue by the main gate of the base?

A. It looks like there's two blue squares, but I do see the one towards the middle of the intersection.

[15]

Q. Yes, you are right; there is one that's partly hidden by an arrow. I'm talking about the other one.

A. Okay.

Q. All right. So that's the area you are discussing. Okay, and when you said that the road has joint jurisdiction, and I think you mentioned with the state of California, the public is allowed to travel on that road, correct?

A. Yes.

Q. Okay. On both Highway One and the other road, California road?

A. Excuse me. So the public travels—Can you rephrase that question please?

Q. Okay. On Highway One in that area that you have been discussing where the government has joint jurisdiction with the state of California, it is a road that's traveled by the public. I can take that road, correct?

A. Correct.

Q. Okay. Are you familiar with the green line at the intersection that we have been discussing?

A. Yes.

Q. And what does that green line reflect, to your knowledge?

A. It portrays the demarcation area of the right-of-way is what I believe.

Q. What type of jurisdiction, to your knowledge, is behind the green line?

[16]

A. On which side?

Q. Towards the gate.

A. Towards the gate, that would be federal jurisdiction.

Q. Exclusive jurisdiction?

A. Yes.

Q. And on that picture you see a little arrow that states 'visitor's center'. Do you see that?

A. Uh-huh.

Q. Can you tell us what it is referring to?

A. Visitors to the installation; contractors, employees, family.

Q. And that is beyond the green line, correct?

A. Yes, ma'am.

Q. All right. Is there a bus station also beyond the green line, to your knowledge?

A. I'm not aware of a bus station. I think at one point there was a local bus that dropped employees off at that parking lot. I'm not sure if it's still working or not.

Q. At the parking lot. You mean the visitor's center parking lot?

A. The visitor's center parking lot, yes.

Q. All right. And are you familiar with the designated area for protest at the intersection of Highway One and California Road?

A. Yeah, I guess I'm familiar that people do protest there. [17] I'm unfamiliar if there's a designated area.

Q. Okay. But you know which area I'm talking about?

A. Yes.

Q. That's along the road, correct?

A. Yes, it is.

Q. And that's an area of concurrent jurisdiction between the federal government and the state of California?

A. Yes, I believe it is.

MS. SWYSEN: Thank you very much.

THE WITNESS: All right.

THE COURT: Mr. Apel, do you have cross examination?

(No audible response)

MR. APEL: Good morning, Mr. Puckett.

THE WITNESS: Good morning.

CROSS EXAMINATION

BY MR. APEL:

Q. I'm going to refer to the same picture you were just looking at. I just have a couple of questions about it. We've determined that the protest site as it's shown on the image is concurrent jurisdiction, am I right?

A. It looks to be about in that area, yes.

Q. Okay, good.

A. But, again, the resolution is not there for me to—

Q. Sure, I understand. But definitely the visitor control center is in exclusive jurisdiction?

[18]

A. Yeah. The visitor's control center is in that exclusive jurisdiction, and it looks like the protest site, for lack of a better term, is in some sort of right-of-way.

Q. Yeah. And how about Vandenberg Middle School; would that be exclusive or concurrent jurisdiction?

A. I believe that's concurrent.

MR. APEL: That's all. Thank you so much.

THE COURT: All right, Captain, do you have any redirect?

CAPTAIN HANEY: No redirect, your Honor; thank you.

THE COURT: May the witness be excused?

(No audible response)

THE COURT: May the witness be excused?

MS. SWYSEN: Yes, your Honor.

CAPTAIN HANEY: Yes, your Honor.

THE COURT: All right. Mr. Puckett, thank you for your testimony; you're excused.

THE WITNESS: Thank you, ma'am.

(Andrew Puckett exits the witness stand)

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case Nos.: 2:10-CR-869-JFW
CVB 1982007

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN DENNIS APEL, DEFENDANT

Case Nos.: 2:10-TK-2006-UA
CVB 1982006

UNITED STATES OF AMERICA, PLAINTIFF

v.

STEPHEN M. KELLY, DEFENDANT

Santa Barbara, California
Thursday, July 15, 2010
2:08 p.m. to 2:52 p.m.
2:58 p.m. to 3:37 p.m.

CVB TRIAL

BEFORE THE
HONORABLE RITA COYNE FEDERMAN,
UNITED STATES MAGISTRATE JUDGE

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[12]

* * * * *

THE COURT: All right. Then you're ready to call your first witness?

CAPTAIN RIDLON: Yes, your Honor.

CAPTAIN HANEY: Government would like to call Staff Sergeant Andrew Cox to the stand.

THE COURT: All right.

THE CLERK: Please remain standing. Raise your right hand.

[13]

ANDREW COX, GOVERNMENT'S WITNESS, SWORN.

THE CLERK: Please be seated. Please state your name for the record and spell your last name.

THE WITNESS: My name is Staff Sergeant Andrew Cox. Last name is spelled C-o-x.

THE CLERK: Thank you.

THE COURT: Good afternoon, Sergeant.

THE WITNESS: Ma'am.

THE COURT: You may inquire.

CAPTAIN RIDLON: Thank you, ma'am.

DIRECT EXAMINATION

BY CAPTAIN RIDLON:

Q. Sergeant Cox, are you a member of the United States Air Force?

A. I am.

Q. And what is your position at Vandenberg Air Force Base?

A. I'm the non-commissioned officer in charge of police services.

Q. And how long have you been doing that for?

A. That particular job I've been doing for a little over a year and entire in the Air Force is nine years.

Q. What does that entail?

A. I oversee law enforcement operations on Vandenberg.

Q. Do you have any role in protest activities on Vandenberg Air Force Base?

[14]

A. I do at times.

Q. Can you explain just briefly?

A. If management restricts the amount of people we have on base, I will go out and assist with protest activities.

Q. Were you working on 7 April 2010?

A. Yes, I was.

Q. Which shift were you working?

A. I was working particularly just for the protest.

Q. And what were your duties that day?

A. I was to ensure safety and security of the installation.

Q. Did you respond to the protest that day?

A. I did.

Q. And what was your job at the protest?

A. I was to identify the protesters and if anybody was on the ban-and-bar roster to ask them to leave the area. If they would not leave the area, then they were going to be cited for trespassing.

Q. Did you positively identify any protesters that day?

A. I did.

Q. Who did you identify?

A. I identified John Apel.

Q. Do you see him in the courtroom here today?

A. I do.

Q. Can you please briefly describe him?

A. He is wearing a plaid button-up shirt with a beard and [15] some glasses and hair combed over to the side.

Q. Can you point him out, please?

A. Yes, sir. He's right here to the—all the way to my left.

CAPTAIN RIDLON: Your Honor, can the record reflect that the witness has identified the accused?

THE COURT: It shall.

BY CAPTAIN RIDLON:

Q. And where was Mr. Apel standing when you identified him?

A. He was standing along the edge of Highway 1 in front of the Vandenberg Air Force Base sign on concurrent jurisdiction.

Q. And—in other words, he was standing on Vandenberg Air Force Base property?

A. He was. He was standing on the grass.

Q. After you identified Mr. Apel, what did you do?

A. I asked him if he would be willing to give a form of identifications, government form of identification to positively identify himself.

Q. And what was his response?

A. "No."

Q. And when he didn't give you identification, what did you do then?

A. I asked him if he would be able to—or actually Sergeant Johnson—I was standing right next to him. He asked him if he would leave the area.

[16]

Q. And what was his response?

A. He felt that he had the right to be there.

Q. And so what did you do then?

A. At that time is when we—it was about—we stepped back across the road. We talked with Investigator Silva and then we came back over and we asked him to step back and we issued him a citation.

Q. What did you issue him a citation for?

A. We issued him a citation for Title 18, Section 1382, trespassing.

Q. And what happened after you issued him the citation?

A. He departed the area.

Q. Do you know where he went or—

A. He walked back with the group of protesters across Highway 1 back over to their vehicles.

Q. And then they departed the area?

A. They did.

Q. Did you write any other citations for trespassing on 7 April?

A. I did.

Q. Who did you write it for?

A. I wrote for George Manley and for Mr. Kelly. I can't remember exactly all the citations that were written that day.

Q. Okay. But you did write one for Mr. Kelly?

A. I did.

[17]

Q. And where was Mr. Kelly standing when he was identified?

A. He was in the same place as Mr. Apel along the Highway 1.

Q. And so on Vandenberg Air Force Base in concurrent jurisdiction?

A. Yes, sir.

Q. And who identified Mr. Kelly?

A. Crystal Silva.

Q. And was any other action taken prior to Mr. Kelly being cited?

A. He was read his barment order.

Q. Did you see him be read his barment order?

A. I saw it. I didn't hear it. I wasn't in the exact location when that was being read.

Q. And what questions, if any, did you ask Mr. Kelly?

A. Mr. Kelly—I asked Mr. Kelly for the citation purposes his name, address, phone number, the general items required for the citation.

Q. Did he provide it to you?

A. No.

Q. Who provided that information then?

A. I received that information also from Investigator Silva that had it from previous contacts.

Q. And so just to review, what did you cite Mr. Kelly with?

A. Title 18, Section 1382.

Q. Trespass?

[18]

A. Yes.

Q. And what did you—what did Mr. Kelly do after you cited him?

A. He also departed the area.

Q. In the same fashion Mr. Apel did?

A. Yes, sir.

CAPTAIN RIDLON: No further questions for the witness at this time, your Honor.

THE COURT: All right. Mr. Apel, do you have cross examination?

CROSS EXAMINATION

BY MR. APEL:

Q. Good afternoon.

A. How are you doing, sir?

Q. Just for clarification, you testified that after we were cited that we left the area. Do you remember if we left the area immediately or if we rejoined the protest and then left the protest when it was over?

A. You, I believe, did not leave the area immediately. You left the area moments after when you rejoined the protest and then departed the area.

Q. Okay. I just wanted to clarify that.

A. Roger.

Q. Was it a scheduled protest that day?

A. I believe so.

[19]

Q. Was I holding a protest sign?

A. I do not recall.

Q. Okay. Did you conclude that I was protesting when I was there?

A. I did.

Q. Okay. And was I acting in an orderly manner?

A. You were.

Q. Thank you. Was I presenting a security risk to base personnel or property or operations?

A. I don't believe so.

Q. Was I violating any rules listed in the Base Protest Advisory other than I wasn't supposed to be there with a ban-and-bar.

A. With a ban-and-bar—other than that, no.

Q. Okay. That's good. Thank you.

THE COURT: Mr. Kelly?

MR. KELLY: Thank you.

CROSS EXAMINIATION

BY MR. KELLY:

Q. Good afternoon, Sergeant Cox.

A. Yes, sir.

Q. Can you help the Court just a little bit on this? Would—you're policing in the area but apparently you—since it was a scheduled protest, you were assigned to us? Is that—do I have that right?

[20]

A. No. When we received word that there were protesters in the area—

Q. Uh-huh.

A. —I was briefed that the protest was going on and I was told to respond to the area.

Q. I see. But you have general duties on the base? You're protecting the base?

A. Correct.

Q. And may I just ask—just make an inquiry about that in general? Are you—in the course of your job, are you—if some people cross the road towards the base and that green grass area, would that put you on some kind of alert or something or would you be asked to respond to that?

A. If they would cross the highway—

Q. Uh-huh.

A. —and then stand in that area—

Q. Uh-huh.

A. —yes, we would go up there in any fashion.

Q. But what—tell me. Are there other people that come and go out of that area, out of the base? What's the criteria for which you respond to people coming, you know, on that side of the road? What's the criteria you use?

A. If they—I apologize. If they come across the road—

Q. Yes.

A. —and they stop and stand—

[21]

Q. Yeah.

A. —and they stay in that area for—

Q. Yeah.

A. —an elongated amount of time, then we will respond up there to identify the individuals—

Q. Okay.

A. —and find out if they're there for—for what reason.

Q. That's right. That's what I expected. How about a bicycle crossing the road? Would that—and if they paused or went to the visitors' center, would you respond to that?

A. If they stayed there for a long period of time, absolutely. If somebody was saying that they were there acting suspiciously, yes.

Q. And the Breeze bus—

A. The—

Q. —coming in and takes a turn, I believe, around the visitors' center and drops somebody off. Would you confront them?

A. No. They get dropped off and they'll immediately go to the gate to get onto the installation or get dropped off to go elsewhere.

Q. Okay. So I guess my question is it—I see in your job that you've got to do this but I was just wondering what's the criteria that would apply to people on the grass.

A. If there's standing there for a long period of time.

[22]

Q. Uh-huh.

A. You know, if they're standing for more than a minute or two or three and they are trying to get the attention of traffic, possibly causing a traffic hazard—

Q. Uh-huh.

A. —in any way, then that's when—

Q. That concerns you?

A. Yes, sir.

Q. Okay.

A. Safety and security.

Q. Just a sense here. A lot of people coming and going on the highway, right? A lot of people coming in and out of the base and then even a scheduled protest or we've been called—we call it a "vigil." I hope that's okay. But at the same time, too, it just seems like, you know, the lingering there and the—you know, the signs—in your mind, is that trouble to you or is that a—is that—in your sense of policing and taking of the base and looking out for security, is that trouble? Is that—would that cost your trouble out there?

A. It potentially could. I feel that it could.

Q. I see. I see. Are you under any orders—when you come to the point where you think, well, yeah, there's some potential here of trouble, are you under any particular orders or do you have to seek advice at—from one of your superiors?

A. If we feel something that is a safety or security—

[23]

Q. Uh-huh.

A. —then we can act on it. So there—

Q. On your own, you're saying?

A. On your own.

Q. I see. And in this—and that particular day, did we constitute a threat to the base?

A. Threat to the base, no.

Q. No.

A. But you were standing—the—every individual that was there that particular day was standing along the edge of a U.S. highway on the grass that—

Q. Okay.

A. —were there for a long period of time.

Q. Okay. And do you—and once again, in your understanding, we are something that has to be addressed and that should be every time, correct? Every time somebody shows up out there, you should address them?

A. Yes, sir.

Q. Okay. Is there anything that you can say at any time—what would relieve you of that responsibility at any time to address people standing on the grassy knoll—or grassy strip?

A. If—honestly, if I felt it was unsafe or unsecure or anything like that, I would say that nothing would probably stop me.

Q. I see. I see. Now, you say you've been there for a year?

[24]

A. Well, I've been at Vandenberg for five years now.

Q. Five years but your assignment as a—can I use the word "patrol" or is that—yeah.

A. That's fine, sir.

Q. In your patrol, has there any—been a time when you folks have not gone out there—Air Police, I mean, have not gone out there to confront people?

A. Every time I've been working and there has been activity, there has been when I have.

Q. I see. And how often do you work, roughly?

A. Well, right now I'm working in an office position. So I work Monday through Friday right now but when I was working patrol, it was anywhere from five to—you know, four to five days a week.

Q. Okay. So—and you haven't heard of any time when it just, sort of, let people be out there?

A. There's always somebody that has eyes on.

Q. Okay. Well, thank you. No further questions.

THE COURT: All right. Captain, any redirect?

CAPTAIN RIDLON: Just briefly, your Honor.

REDIRECT EXAMINATION

BY CAPTAIN RIDLON:

Q. And so after you—as part of your normal, standard operating procedure, after you identify individuals if they're following all the rules and not on the barment roster, are they [25] allowed to remain there or just—

A. They are.

Q. So it's only individuals who are on the barment roster or otherwise committing crimes that are detained inside it?

A. Yes, sir.

Q. And what could be the risks of having individuals standing just outside the gate of Vandenberg Air Force Base?

A. There's a potential for a major traffic incident to happen. Somebody trips and falls in the middle of Highway 1 and there's a traffic collision or anybody—they could attempt to come on base for a security aspect.

Q. So essentially to protect the base, we want to keep people from just loitering outside it?

A. Yes, sir.

Q. But people do have to come and go, correct?

A. Yes, sir.

Q. But we address it when we view it as being suspicious because they're lingering?

A. Yes, sir.

Q. Thank you very much.

THE COURT: Anything further from the Defense?

MR. APEL: No, ma'am.

MR. KELLY: Just one.

[26]

RECROSS EXAMINATION

BY MR. KELLY:

Q. You're a trained policeman?

A. Yes.

Q. So in your addressing some people lingering who have apparently told you ahead of time they're going to be there, right. So your focus becomes on these—attaches to these folks to get to identify them that are standing on the grassy strip and then in the meantime, a lot of activity of people who have not asked your permission to be there are—wouldn't you say they're coming and going all the time?

A. They're driving onto the installation. They're not—

Q. You can drive onto the base. You take the bus. You can go to the school.

A. Correct.

Q. Okay. How would—as a police officer, a trained police officer, how do you address those potentials when you've got the—you've got cooperative people who have asked in advance to be on the grassy strip. Where is the criteria for catching other kinds of potential problems?

A. Well, they'll be entering in the installation through installation gate. So at that time they're going to be positively identified to get onto the installation.

Q. Do you—are you apprised of the exclusive nature of the green line as a boundary for the exclusive jurisdiction of the [27] base?

A. Yes.

Q. And what—how do you picture Highway 1?

A. Highway 1 is concurrent jurisdiction.

Q. Concurrent jurisdiction, very good. So—however, once somebody gets across the green line and they're in exclusive jurisdiction, what criteria applies to them whether they stop at the visitors' center or whatever? How do you manage that?

A. I'm not sure I understand your question.

Q. Well, security-wise; how do you manage that? How do you manage you know—why—how do you—what's set up at the base to confront those people versus those who have cooperated with you and told you they're going to be there ahead of time?

A. There's an armed sentry at the gate that is—

Q. Well, you're speaking of the kiosk about a hundred and fifty yards in on California—

A. I'm not sure of the distance but it's in—on California Boulevard.

Q. Okay. But that area between the green line and that kiosk, that's the area of your—of—you have to patrol, right?

A. That is part of my area, yes, sir.

Q. Okay, And some people don't always check with you?

A. And if they don't check and we see them in that area—

Q. Okay.

[28]

A. —is when we would confront them and ask them—

Q. Okay.

A. —what they were doing in that area.

Q. What—just in your personal opinion, but nonetheless an educated one as somebody involved in security, what do you think we're doing out there on the grassy strip?

A. Showing what you believe in.

Q. Okay. Thank you.

MR. KELLY: No further questions.

THE COURT: Any redirect?

CAPTAIN RIDLON: No, your Honor.

THE COURT: May the witness be excused?

CAPTAIN RIDLON: Yes, your Honor.

THE COURT: All right. Sergeant Cox, thank you for your testimony.

(Witness was excused)

* * * * *

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
AUG 16 2013
OFFICE OF THE CLERK

No. 12-1038

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. 1382, which prohibits a person from reentering a military installation after a commanding officer has ordered him not to reenter, may be enforced on a portion of a military installation that is subject to a public roadway easement.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 676 F.3d 1202. The order of the district court (Pet. App. 5a-15a) is not reported. A previous opinion of the court of appeals in a case presenting the same issue (Pet. App. 16a-24a) is reported at 651 F.3d 1180.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2012. A petition for rehearing was denied on September 27, 2012 (Pet. App. 3a-4a). On December 19, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 25, 2013. On January 16, 2013, Justice Kennedy further extended the time to February 24, 2013. The petition for a writ of certiorari was filed on February 22,

2013, and was granted on June 3, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1382 of Title 18 of the United States Code states:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined under this title or imprisoned not more than six months, or both.

STATEMENT

1. Vandenberg Air Force Base (Vandenberg or Base) is located in a rural area on the coast of central California, approximately 170 miles northwest of Los Angeles. Vandenberg is the site of sensitive missile- and space-launch facilities, and in part for that reason it is generally closed to the public. Vandenberg's commander, like the commander of any military installation, possesses "'the historically unquestioned power * * * summarily to exclude civilians from the area of his command'" as the "necessary concomitant of the basic function of a military installation." *Greer* v. *Spock*, 424 U.S. 828, 838 (1976) (quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961)).

The Base is, however, crossed by two state roads—Highway 1 and Highway 246—that are open to the public for vehicular travel. Highway 1 runs across the eastern part of the Base and provides the most direct route between the closest town to the north (Santa Maria) and the closest town to the south (Lompoc). Otherwise, travelers must drive through or around the Santa Ynez Mountains. Highway 246 runs across the southern part of the Base, and it allows travelers to reach a beach and train station on Vandenberg's western edge. See J.A. 44; see also Gov't C.A. Br. 4-5.

The land crossed by Highways 1 and 246 is owned by the United States and under the control of the Department of the Air Force (Air Force), which has granted roadway easements to the State of California and Santa Barbara County. See Pet. App. 7a, 23a-24a; J.A. 35-44. Such easements are common on military bases. See *United States* v. *Albertini*, 472 U.S. 675, 698-699 (1985) (Stevens, J., dissenting) ("[H]ighways or other public easements often bisect military reservations."). In granting those easements, the Air Force retained jurisdiction over the roadways; it simply agreed to exercise concurrent jurisdiction with the State and County. See Pet. App. 7a; J.A. 39-40, 84-87. For example, in the instrument granting the easement for Highway 1 (which is the roadway at issue in this case), the Air Force expressly provided that the roadway's "use and occupation * * * shall be subject to such rules and regulations as the [base commander] may prescribe from time to time in order to properly protect the interests of the United States." J.A. 36; see Pet. App. 14a. Moreover, the use of "[t]he roadway easements through Vandenberg * * * is limited to road maintenance and vehicular travel activity through the [B]ase." J.A. 51.

Highway 1 runs past Vandenberg's main gate. Near that gate, the base commander has designated an area for public protesting. J.A. 74-75 (satellite views of protest area). That area, which is part of the Base, also falls within the geographic boundaries of the Highway 1 easement. See Br. in Opp. 1-4; J.A. 50, 57-58, 78-79. The area was designated as a protest area following litigation in the late 1980s. That litigation resulted in a policy statement indicating that peaceful demonstrations would be allowed in the designated area but that restrictions could be placed on the area to limit "activities which can result in unsafe conditions" or that "materially interfere with or have a significant impact on the conduct of the military mission." J.A. 50; see Pet. App. 7a-8a.

In an exercise of his command over Vandenberg, the base commander has issued guidelines and restrictions to facilitate the orderly use of the protest area, addressing such subjects as permitted and forbidden objects, scheduling coordination, parking, and toilet facilities. See J.A. 52-58. One of the restrictions is that anyone barred from Vandenberg may not enter the Base for any reason, including to protest in the designated area. See J.A. 54. Base rules explain that "[i]f you are currently barred from Vandenberg AFB, there is no exception to the barment permitting you to attend peaceful protest activity on Vandenberg AFB property." *Ibid.* The rules further explain that "[i]f you are barred and attend a protest or are otherwise found on base, you will be cited and detained for a trespass violation due to the non-adherence [with] the barment order." *Ibid.*

2. Respondent has twice been barred from Vandenberg, the first time in 2003 for trespassing and vandalizing base property, and the second time in 2007 for tres-

passing. See Pet. App. 8a, 13a; J.A. 59-66 (barment orders). Respondent does not challenge the validity of either barment order. See C.A. E.R. 27. The second barment order was still in effect in 2010, when respondent reentered Vandenberg on three occasions (in January, March, and April) to protest in the designated area. Each time, respondent was reminded of the existing barment order, asked to leave Vandenberg, and given two to three minutes to do so. Each time, when he failed to leave, respondent was cited for a violation of 18 U.S.C. 1382, which makes it a misdemeanor to reenter a federal military installation "after having been * * * ordered not to reenter by any officer or person in command or charge thereof." Respondent was then escorted and released outside Vandenberg. See J.A. 97-100; C.A. E.R. 203-204, 219-220, 222, 225-227.

3. Respondent moved to dismiss all three counts on the ground that the First Amendment prevented enforcement of Section 1382 in the designated protest area. The magistrate judge denied that motion. Pet. App. 7a. Respondent was convicted of the three offenses in two separate bench trials, and he was ordered to pay a total of $355 in fines and fees. *Ibid.*; C.A. E.R. 79, 86. Respondent appealed his convictions to the district court on both statutory and constitutional grounds. As relevant here, he contended that Section 1382 applies only to property over which the United States has "absolute ownership" or an "exclusive right [of] possession." Pet. App. 9a (internal quotation marks omitted). Accordingly, respondent argued, the government could not enforce Section 1382 in the designated protest area, because the Highway 1 easement leaves the United States without exclusive possession of that area. See *id.* at 9a, 14a-15a.

The district court affirmed respondent's convictions. Pet. App. 5a-15a. The court reasoned that the United States "has a sufficient possessory interest and exercises sufficient control over the designated protest area in order to sustain [respondent's] conviction[s] under 18 U.S.C. § 1382." *Id.* at 14a. The court explained that the United States "owns the land upon which [respondent] trespassed," and although "this ownership interest is subject to an easement, the terms of the easement provide that its use" is subject to base rules and regulations. *Ibid.* The court noted that, "consistent with its ownership and the scope of the easement, the Government exercises substantial control over the designated protest area, including, for example, patrolling the area and creating and enforcing an extensive set of restrictions on its use." *Id.* at 14a-15a. Finally, the court rejected respondent's First Amendment argument, holding that the designated protest area is not a public forum and that, in any event, respondent's previous barment order was a permissible content-neutral basis for his exclusion. See *id.* at 11a-14a.

4. The court of appeals reversed in a per curiam opinion. Pet. App. 1a-2a. The court held that, under its previous decision in *United States* v. *Parker*, 651 F.3d 1180 (2011) (per curiam) (reproduced at Pet. App. 16a-24a), Section 1382 applies only to areas over which the federal government exercises an exclusive right of possession. See Pet. App. 2a. "[B]ecause a stretch of highway running through Vandenberg AFB is subject to an easement," the court reasoned, "the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under [Section] 1382 cannot stand, regardless of an order barring a defendant from the base." *Ibid.* The

panel "question[ed] the correctness of *Parker*," but concluded that it was "binding" and "dispositive of th[e] appeal." *Ibid.*

The court of appeals denied the government's petition for rehearing en banc, which one of the panel members recommended granting. Pet. App. 3a-4a.

SUMMARY OF ARGUMENT

Congress has made it a misdemeanor for a person to "reenter[] or [be] found within" a "military * * * installation" that is "within the jurisdiction of the United States," if that person has been barred from that installation. 18 U.S.C. 1382. Respondent concedes (Br. in Opp. 2, 4, 7, 13) that the express elements of the statute are satisfied here. After receiving a valid barment order, respondent was found within a military installation—Vandenberg Air Force Base—that is within the jurisdiction of the United States. None of those elements requires the showing demanded by the court of appeals, that the United States have absolute ownership and exclusive possession of the property on which the person was found: "[R]eenter[ing]" or being "found within" a place simply defines the defendant's criminal conduct. The term "military * * * installation" refers to any place subject to military command. And Section 1382's statutory history shows the phrase "within the jurisdiction of the United States" was primarily intended to ensure that the statute would broadly protect not only military installations located in States and incorporated territories, but also installations located, for example, in the outlying possessions of the United States.

Lacking support for his position in Section 1382's text, respondent instead urges this Court to "read extra-statutory requirements into [Section] 1382, including the exclusive-possession requirement." Br. in Opp. 17. But

it was settled decades ago in *United States* v. *Albertini*, 472 U.S. 675, 682 (1985), that courts must not engraft extratextual limitations onto Section 1382. Indeed, among the extratextual limitations the defendant in *Albertini* proposed, and the Court rejected, was a limitation "to military bases where access is restricted," *ibid.*, *i.e.*, a limitation that closely resembles respondent's "exclusive possession" proposal. And even the law of trespass (which in any event is not codified in Section 1382) would not support respondent's reading of the statute.

An exclusive-possession limitation would threaten substantial harm to the safe and orderly operation of many of this Nation's military installations. Base commanders rely on Section 1382 to maintain the safety and integrity of their personnel and facilities. That interest is undiminished by the presence of a highway easement across a military installation. The misdemeanor sanctions in Section 1382 are effective both in deterring repeat harmful conduct in the first instance, and if necessary, in preempting the threat posed by the return of an individual already identified as a risk to base personnel and operations—all without resorting to prosecutions under other laws with harsher criminal penalties. For that reason, Section 1382 has great value at the places at the margin of a military installation where federal property rights may not be absolute. Respondent's position, by contrast, ties a base commander's hands by forcing him to await real damage and deeper entry into his base by the very individuals he has already identified as threats to the base under his command.

Finally, respondent defends the judgment below on the alternative ground that his conduct was protected by

the First Amendment. Because the court of appeals did not reach that ground, this Court should not address his claim in the first instance, and should instead remand for further proceedings. In any event, *Albertini* forecloses respondent's argument: "Section 1382 is content-neutral" and as such "satisfies the First Amendment" because it "serves a significant Government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security." 472 U.S. at 687.

ARGUMENT

Section 1382 of Title 18 prohibits any person from "reenter[ing] or [being] found within" a "military * * * installation" that is "within the jurisdiction of the United States" if he has been "ordered not to reenter by [a commanding officer]." Respondent concedes (Br. in Opp. 2, 4, 7, 13) that the express requirements of Section 1382 are satisfied here: After receiving a valid barment order, he was found within a military installation within the jurisdiction of the United States. The court of appeals nonetheless reversed respondent's convictions on the view that Section 1382 is inoperative unless the government also "prove[s] its absolute ownership or exclusive right to the possession of the property upon which the violation occurred." Pet. App. 18a-19a.

The text, history, and purpose of Section 1382 all show that no such absolute-ownership or exclusive-possession requirement exists. This Court has previously rejected efforts to engraft similar extratextual limitations onto this very statute, *United States* v. *Albertini*, 472 U.S. 675, 682 (1985), and even respondent concedes that the court of appeals' "extra-statutory * * * exclusive-possession requirement" "does not appear in the statute," Br. in Opp. 17. Congress long

ago amended Section 1382 to ensure its broad application, and this Court has understood it to apply in situations much like the one here. And an exclusive-possession requirement would preclude the application of Section 1382 at many locations where it is needed to protect against particular individuals who pose a threat to the safe and orderly operation of military installations. The judgment of the court of appeals should be reversed.

A. Respondent Violated Section 1382 By Reentering And Being Found Within A Military Installation Within The Jurisdiction Of The United States After Having Been Barred From That Installation

Section 1382 of Title 18 of the United States Code prohibits two kinds of conduct on federal military installations. The statute's first clause provides that "[w]hoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard * * * installation, for any purpose prohibited by law or lawful regulation," is guilty of a misdemeanor and may be fined or imprisoned not more than six months. 18 U.S.C. 1382. The second clause—which is at issue here because respondent was subject to a barment order—provides that "[w]hoever reenters or is found within any such * * * installation, after having been * * * ordered not to reenter by any officer or person in command or charge thereof," is guilty of the same offense. When the statute's second clause prohibits reentry into "any such * * * installation," it means the type of place enumerated in the preceding clause, *i.e.*, a military installation within the jurisdiction of the United States. *Ibid.* Thus, as the Court explained in *Albertini*, the plain language of Section 1382 "makes it unlawful for a person to

reenter a military base after having been ordered not to do so by the commanding officer." 472 U.S. at 680.

Respondent was prosecuted under the second clause of Section 1382. Accordingly, the United States proved at trial that he was subject to a barment order; respondent does not contest the order's existence and validity. See J.A. 59-66; C.A. E.R. 96, 119-120, 219-221. The government was required to, and did, prove three further things at trial: (1) that respondent "reenter[ed] or [wa]s found within," (2) a "military * * * installation," (3) "within the jurisdiction of the United States." None of those three elements demands that the military have exclusive possession of the place in which respondent was found. Indeed, Section 1382 says nothing about ownership or possession, let alone a requirement of absolute ownership or exclusive possession. Cf. Br. in Opp. 17 (conceding that "[Section] 1382 makes no mention of control or its exercise by the government").[1]

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[1] As the court of appeals noted, see Pet. App. 19a n.2, the *U.S. Attorney's Manual* states that Section 1382 applies to any military reservation "over which the United States has exclusive possession." U.S. Dep't of Justice, *U.S. Attorney's Manual, Title 9, Criminal Resource Manual* § 1634 (1997) (*Manual*). But the only authority that the *Manual* cites for that proposition, *Holdridge* v. *United States*, 282 F.2d 302, 309 (8th Cir. 1960), does not support it. The defendants in *Holdridge* contended that their convictions were invalid because the federal government lacked exclusive possession of the property on which they had trespassed. See *id.* at 306-307. The *Holdridge* court rejected that argument on the ground that in fact the federal government did have exclusive possession, having taken "[no]thing less than the entire fee including any highway right which may have existed." See *id.* at 308. The court therefore did not address whether exclusive possession is necessary. In any event, notwithstanding the *Manual*, the government has argued in this and other cases that Section 1382 does not require exclusive possession.

1. The terms "reenters" and "is found within" describe the defendant's criminal conduct under Section 1382. They do not define the particular places in which those acts constitute a misdemeanor, much less require that the military exercise exclusive possession of those places. Congress's use of common verbs without specialized legal meanings suggests a deliberate effort to avoid the restrictive connotations that other verbs (such as "trespasses") might have conveyed. See *United States* v. *Mowat*, 582 F.2d 1194, 1203 (9th Cir.) ("[I]f any inference based on a comparison with the common law is appropriate, it is that Congress sought to divorce [Section 1382] from the requirements of common law trespass."), cert. denied, 439 U.S. 967 (1978); see also p. 19, *infra*.

Respondent acknowledges that his "activity which gave rise to this case * * * occurred *in*" an area that lies within the Base. Br. in Opp. 4 (emphasis added). And the United States presented testimony to that effect at trial. See, *e.g.*, J.A. 98-99 ("Q. And where was [respondent] standing when you identified him? A. He was standing along the edge of Highway 1 in front of the Vandenberg Air Force Base sign on concurrent jurisdiction. Q. And—in other words, he was standing on Vandenberg Air Force Base property? A. He was. He was standing on the grass.").

2. The term "military * * * installation" is broad and unqualified. The intended breadth is clear from Congress's effort to enumerate every possible kind of military facility: "military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation." 18 U.S.C. 1382. Together, those terms span any place subject to military command. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961) (noting the "unques-

tioned power of a commanding officer" with respect to "the area of his command"). Nothing in the statute suggests that Congress limited the authority of military commanders over their installations simply because the United States' property rights may be less than "absolute" and "exclusive" (Pet. App. 9a) in a particular location. In particular, nothing in the list of military facilities suggests Congress intended to exempt from coverage the many public roadways running through military installations. See *Albertini*, 472 U.S. at 698-699 (Stevens, J., dissenting) ("[H]ighways or other public easements often bisect military reservations."). And such an exception would be out of place in a statute concerned with protecting all places under military command.

Although Title 18 does not define "military installation," Section 1382 is consistent with various provisions of Title 10 governing the Armed Forces generally. Those provisions define federal military installations as facilities "under the jurisdiction" of the Department of Defense. 10 U.S.C. 2687(g)(1). See, *e.g.*, 10 U.S.C. 2391(d)(1) and 2667(i)(3) (incorporating Section 2687's definition of "military installation"); see also 10 U.S.C. 2801(c)(4) (defining the term "military installation" in relevant part as "a base * * * under the jurisdiction of the Secretary of a military department"); cf. 10 U.S.C. 101(a)(6) (defining the term "department" as, *inter alia*, "installations * * * under the control or supervision of the Secretary of Defense"). Under that definition, public roadways within the military's jurisdiction (whether exclusive, concurrent, or proprietary) are part of a military installation.

Respondent acknowledges that, although he was found in a place where the United States' property rights are not absolute, he was nonetheless within a

military installation: "Vandenberg['s] * * * legal limits embrace a public highway, Highway 1"; "[w]ithin the easement [for Highway 1] is a designated area * * * set aside for the conduct of peaceful protests," where respondent was found. Br. in Opp. 1, 2, 4; see also C.A. E.R. 9-10 (stipulation to those facts at trial).

3. The phrase "within the jurisdiction of the United States" simply requires that the military installation in question be in an area subject to federal jurisdiction. "[I]t cannot be disputed," respondent admits, "that [he] was geographically within an area subject to the jurisdiction of the United States the times he was arrested." Br. in Opp. 13. That is sufficient to satisfy the requirements of the statute.

Numerous federal statutes, including criminal statutes, apply to persons or property "within the jurisdiction of the United States." See, *e.g.*, 42 U.S.C. 1981(a) (affording "[a]ll persons within the jurisdiction of the United States" equal rights "to make and enforce contracts, to sue, be parties, [and] give evidence"); 42 U.S.C. 1983 (permitting "any citizen of the United States or other person within the jurisdiction thereof" to seek relief for the deprivation of federally protected rights under color of state law); see also 18 U.S.C. 956(a)(1) and (b) (conspiracy to injure persons or property in a foreign country); 18 U.S.C. 981(a)(1)(B) (civil forfeiture of property related to certain offenses against foreign nations). Those statutes, like Section 1382, require the simple presence of federal jurisdiction. They do not require absolute and exclusive ownership of property by the federal government itself. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160, 172 (1976) (holding that 42 U.S.C. 1981 prohibits private schools from dis-

criminating against applicants for admission on the basis of race).

Respondent has argued (Br. in Opp. 14-15) that this conventional understanding of "within the jurisdiction of the United States" is mistaken because it would render the phrase superfluous. That argument misapprehends the phrase's primary purpose, which Section 1382's statutory history reveals was to ensure the provision's broad application. As originally enacted in 1909, Section 1382's predecessor did not contain any element of "jurisdiction"; it simply prohibited reentry following barment from any military reservation. See Act of Mar. 4, 1909, ch. 321, § 45, 35 Stat. 1097. A question arose, however, whether the statute applied not only to States and incorporated territories, but also to the Canal Zone (and, by implication, to other outlying possessions of the United States). See S. Rep. No. 739, 76th Cong., 1st Sess. 1 (1939); *id.* at 2 (reprinting letter from the Secretary of War). In response, Congress amended the statute "to make it applicable to the outlying possessions of the United States" by adding the phrase "within the territory or jurisdiction of the United States, including the Canal Zone, Puerto Rico, and the Philippine Islands." Act of Mar. 28, 1940, ch. 73, 54 Stat. 80. As explained on the floor of the House, "[t]he bill simply and more clearly confers jurisdiction upon the courts in criminal cases affecting military reservations in * * * outlying possessions." 86 Cong. Rec. 3013 (1940) (statement of Rep. Hobbs).

In 1948, when Congress revised and codified federal criminal offenses by enacting Title 18 into positive law, it removed the references to "territory" and "Canal Zone, Puerto Rico, and the Philippine Islands." See Act of June 25, 1948 (1948 Act), ch. 645, § 1382, 62 Stat. 765.

Congress did so because, with the exception of the Canal Zone, those areas were covered by the definition of "United States" that Congress contemporaneously adopted in Section 5 of Title 18. See H.R. Rep. No. 304, 80th Cong., 1st Sess. A102 (1947); see also 1948 Act § 5, 62 Stat. 685 (defining "'United States,' as used in [Title 18] in a territorial sense" to "include[] all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone").[2]

The phrase "within the jurisdiction of the United States" in Section 1382 thus serves, in conjunction with the broad definition of "United States" in 18 U.S.C. 5, to extend Section 1382 to military installations located, for example, in outlying possessions of the United States. At the same time, the phrase "within the jurisdiction of the United States" also serves a limiting function: It prevents Section 1382 from reaching U.S. military installations in places *not* subject to federal jurisdiction. By contrast, other criminal laws relating to military operations are not confined to "the jurisdiction of the United States." See 10 U.S.C. 805 ("[The Uniform Code of Military Justice] applies in all places."); 18 U.S.C. 3261 (addressing "[c]riminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States").

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[2] Section 1382 remained in force as to the Canal Zone by virtue of 18 U.S.C. 14, also adopted as part of the 1948 enactment of Title 18 into positive law. See 1948 Act § 14, 62 Stat. 686; see also 18 U.S.C. 5 note; S. Rep. No. 1620, 80th Cong., 2d Sess. 2 (1948). The application of Section 1382 (and many other provisions of federal criminal law) to the Canal Zone was repealed as "outmoded" in 2002. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 4004(a), 116 Stat. 1812 (repealing 18 U.S.C. 14).

B. An Extratextual Exclusive-Possession Limitation Cannot Permissibly Be Engrafted Onto Section 1382

Respondent concedes that "the exclusive-possession requirement * * * does not appear in [Section 1382]" and that the statute "makes no mention of control or its exercise by the government." Br. in Opp. 17. He nonetheless urges this Court to "read extra-statutory requirements into [Section] 1382, including the exclusive-possession requirement." *Ibid.* The Court should decline the invitation. As a general matter, this Court "resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). That principle is dispositive here; it was settled decades ago in *Albertini* that courts must not engraft extratextual limitations onto Section 1382.

1. In *Albertini*, defendant James Albertini attended an open house at a military base years after having been barred from reentering that base, for which he was convicted of violating Section 1382. See 472 U.S. at 677. Although Albertini challenged his conviction on First Amendment grounds, the Court asked the parties to address the predicate question of whether Albertini's conduct was covered by Section 1382. See *id.* at 679-681; 469 U.S. 1071 (1984). Albertini argued that his conduct was not covered by the statute for three reasons: he had reentered the base long after being ordered not to return; at the time of his reentry, the base was open to the general public for purposes of its open house; and he was allegedly unaware that his conduct violated the previous barment order. See *Albertini*, 472 U.S. at 681.

This Court rejected all three efforts to engraft an extratextual limitation onto Section 1382. "First," the Court reasoned, "nothing in the statute or its history supports the assertion that [Section] 1382 applies only to

reentry that occurs within some 'reasonable' period of time." *Albertini*, 472 U.S. at 682. Thus, even assuming "most prosecutions * * * have involved reentry within a year after issuance of a bar order," that fact would not "justif[y] engrafting onto [Section] 1382 a judicially defined time limit." *Ibid.* The Court further reasoned that Section 1382 "applies during an open house," because "[t]he language of the statute does not limit [Section] 1382 to military bases where access is restricted." *Ibid.* Finally, the Court held that Section 1382 does not require the specific intent to violate a barment order: the statute "does not contain the word 'knowingly' or otherwise refer to the defendant's state of mind." *Id.* at 683.

The *Albertini* Court thus made clear that, in interpreting Section 1382, it would "follow the plain and unambiguous meaning of the statutory language" rather than "engraft[] onto" the statute "judicially defined" limits. 472 U.S. at 680, 682. Here, respondent defends the court of appeals' choice to engraft onto Section 1382 a limit the statute does not contain—*i.e.*, a requirement that "the government * * * prove its absolute ownership or exclusive right to the possession of the property upon which the violation occurred." Pet. App. 18a-19a. *Albertini* forbids that form of judicial amendment of the statute Congress enacted.

This case presents a particularly inappropriate occasion for seeking an exception from *Albertini*'s rule. The requirement respondent defends (exclusive possession of the military base) is indistinguishable in kind from one *Albertini* itself rejected (a limitation "to military bases where access is restricted," 472 U.S. at 682). Moreover, this Court has never before doubted the premise that public highway easements are irrelevant to

Section 1382's application. See *Greer* v. *Spock*, 424 U.S. 828, 830 (1976) (recognizing application of Section 1382 to a military installation "including the state and county roads that pass through it"); *id.* at 851 (Brennan, J., dissenting) (noting that the installation was "crossed by 10 paved roads, including a major state highway" and its roads were used daily by thousands of vehicles).

2. a. The notion of an exclusive-possession requirement originated in *United States* v. *Watson*, 80 F. Supp. 649 (E.D. Va. 1948). See Pet. App. 18a-22a (tracing the Ninth Circuit's exclusive-possession requirement back to *Watson*). *Watson* held that "[t]o punish an infraction" of Section 1382 on property subject to an easement, "proof of criminal jurisdiction of the [property] alone was not enough." 80 F. Supp. at 651. The *Watson* court "[wa]s of the opinion" that "[o]bviously," "[s]ole ownership or possession, as against the accused, had to be in the United States or there was no trespass." *Ibid.* It gave no further explanation for this requirement.

The *Watson* court erred because Section 1382 does not codify the common law of trespass. Rather, Section 1382 creates a distinct offense for unlawful reentry into military installations within federal jurisdiction. See *Mowat*, 582 F.2d at 1203 ("Arguably, if any inference based on a comparison with the common law is appropriate, it is that Congress sought to divorce this statute from the requirements of common law trespass."). Indeed, the respondent in *Albertini* urged this Court to interpret Section 1382 in light of common law trespass and the offense of criminal trespass under the Model Penal Code. See Resp. Br. at 21-25, *Albertini*, *supra*, (No. 83-1624). The *Albertini* dissent embraced that argument (see 472 U.S. at 696 & n.6), but the opinion of the Court never mentions trespass law.

b. Not only did *Watson* err in interpreting Section 1382 to codify principles of criminal trespass law, but even that law does not support an absolute-ownership or exclusive-possession requirement. It is undisputed that the United States owns the land at Vandenberg crossed by the roadway easement for Highway 1. That possessory interest, even if not absolute, would be sufficient to maintain a trespass action at common law. See, *e.g.*, *United States* v. *McCoy*, 866 F.2d 826, 830 n.4 (6th Cir. 1989).

The roadway easement across Vandenberg does not alter the analysis. The easement grants the State of California and Santa Barbara County a right-of-way to allow traffic across the land, but says nothing about whether governing law (including Section 1382) permits a particular individual to travel through that area. That alone refutes respondent's absolutist claim that he "had a right to be present at all times on this stretch of public highway" (Br. in Opp. 9). See, *e.g.*, *RKO-Stanley Warner Theatres, Inc.* v. *Mellon Nat'l Bank & Trust Co.*, 436 F.2d 1297, 1300 n.6 (3d Cir. 1970) (A public easement is "subject to power in the state to regulate or forbid altogether [the permitted activity] for the public benefit."); 1 Restatement (Third) of Property (Servitudes) § 3.1 cmt. c (2000) (Restatement) ("Many federal, state, and local statutes and other governmental regulations prohibit or restrict the use of servitudes."); *ibid.* ("[A] servitude that authorizes a use prohibited by zoning is illegal or unenforceable to that extent.").

Moreover, an easement may be used only "for [its] specified purpose"; "unauthorized use * * * is generally a trespass." 1 Restatement § 1.2 cmt. d; 2 Restatement § 8.3 cmt. b. The notion "that as long as [defendant's] activities are conducted within the physical

boundaries of a right of way, [his] activities cannot constitute a trespass * * * misconceives the nature of a right of way." *Southern Utah Wilderness Alliance* v. *BLM*, 425 F.3d 735, 747 (10th Cir. 2005). Thus, in California—where Vandenberg is situated—"the owner of the soil over which [a public roadway easement] passes has . . . an action of trespass against any person" using the roadway for any purpose other than "passing and repassing." *Porter* v. *City of L.A.*, 189 P.2d 105, 106 (Cal. 1920) (internal quotation marks and citations omitted); accord *People* v. *Sweetser*, 140 Cal. Rptr. 82, 85-86 (Cal. Ct. App. 1977); *Pearsall* v. *Post*, 20 Wend. 111 (N.Y. Sup. Ct. 1838) ("Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman cannot stop to graze his steed, without being a trespasser."), aff'd, 22 Wend. 425 (N.Y. 1839). In addition, "[i]n a public grant [of an easement] nothing passes by implication, and unless the grant is explicit with regard to the property conveyed, a construction will be adopted which favors the sovereign." *McFarland* v. *Kempthorne*, 545 F.3d 1106, 1112 (9th Cir. 2008) (quoting *Albrecht* v. *United States*, 831 F.2d 196, 198 (10th Cir. 1987)), cert. denied, 556 U.S. 1104 (2009). Therefore, a public roadway easement across a military installation permits protesting upon the roadway only if the easement "explicit[ly]" grants that right. The easement here does not.

What the easement here *does* provide is that the roadway's "use and occupation * * * shall be subject to such rules and regulations as the [base commander] may prescribe from time to time in order to properly protect the interests of the United States." J.A. 36. Vandenberg's base regulations say the same thing as Section 1382: anyone barred from Vandenberg may not

reenter the base. See J.A. 54. Respondent is left to argue (Br. in Opp. 10) that base regulations may regulate conduct on the easement but may not exclude anyone from the easement. That distinction has no basis in the language of the government's reservation of rights. Nor would it make sense for the government to have surrendered the authority to exclude: without that authority, the government often will lack an effective remedy for unlawful and disruptive conduct.

C. An Exclusive-Possession Limitation Would Threaten Substantial Harm To The Safe And Orderly Operation Of Many Of This Nation's Military Installations

Base commanders rely on Section 1382 to protect and safeguard military personnel and facilities. That interest is undiminished by the grant of a public roadway easement across a military base. That is doubtless why Congress wrote no exclusive-possession limitation in Section 1382 and why this Court should not create one.

1. Individuals may be barred from reentering a military installation for a host of legitimate reasons. For instance, respondent vandalized Vandenberg on a previous occasion (by throwing blood on a sign). See Pet. App. 8a, 13a; J.A. 59, 63. James Albertini had been barred after he "obtained access to secret Air Force documents and destroyed the documents by pouring animal blood on them." *Albertini*, 472 U.S. at 677. The defendant in *Parker* had been barred after allegedly stating that he had considered "get[ting] a gun and com[ing] [to Vandenberg] to take care of business" after being laid off from his job as a contractor at the Base. See Gov't C.A. Br. at 4, *United States* v. *Parker*, 651 F.3d 1180 (9th Cir. 2011) (No. 10-50248). A responsible base commander requires a tool to enforce his orders

excluding such individuals from his area of command. Section 1382 is that enforcement tool.

Of course, Section 1382 is most often effective as a deterrent; most people who are barred from a military installation are not the subject of a later prosecution under Section 1382. Barment orders have issued in response to a wide variety of conduct that suggests particular individuals pose a risk to the safety and integrity of military personnel and property. For example, as Justice Stevens noted in *Albertini*, "bar orders 'have been issued for offenses such as possession of marijuana or narcotics, assault, possession of stolen property, solicitation for prostitution, carrying concealed weapons, traffic offenses, contributing to the delinquency of a minor, impersonating a female, fraud, and unauthorized use of an ID card.'" 472 U.S. at 694 n.4 (Stevens, J., dissenting) (quoting *Spock* v. *David*, 469 F.2d 1047, 1055 (3d Cir. 1972), appeal after remand, 502 F.2d 953 (3d Cir. 1974), rev'd, 424 U.S. 828 (1976)).

As a general matter, the misdemeanor sanctions in Section 1382 are effective both in deterring repeat harmful conduct in the first instance, and if necessary, in providing a basis for an arrest, thus preempting the threat posed by the return of an individual already identified as a risk to base personnel and operations. Section 1382 is a Class B misdemeanor, see 18 U.S.C. 3559(a)(7), and thus stands on the lowest rung of a ladder of federal criminal sanctions for interfering with military functions.[3]

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[3] See, *e.g.*, 50 U.S.C. 797 (violation of defense property security regulations, a Class A misdemeanor); 18 U.S.C. 795, 797 (offenses related to photographing defense installations, Class A misdemeanors); 18 U.S.C. 1384 (prostitution near military facilities, a Class A misdemeanor); 18 U.S.C. 1381 (enticing desertion from the Armed Forces,

2. But Section 1382 can only play its full role if applied according to its terms. Respondent's position—that the statutory text notwithstanding, Section 1382 is unavailable as a first line of defense wherever the military does not have a right of exclusive possession—needlessly ties base commanders' hands. On his view, a commander must await real damage and deeper entry into his base by the very individuals he has already identified as threats to the base under his command. That approach unnecessarily forces the government to proceed under laws with harsher sanctions, and it does nothing to support a base commander's role in preserving the safety and integrity of a military installation. Cf. *Brigham City* v. *Stuart*, 547 U.S. 398, 406 (2006) ("The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties."). Just as "[n]othing in the First Amendment requires military commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly," *Albertini*, 472 U.S. at 689, so too nothing in Section 1382 requires that dangerous game of wait-and-see.

Significantly, Section 1382 often has greatest value at the places at the margin of a military installation where

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a Class E felony); 18 U.S.C. 1361 (damaging government property, a Class C felony or Class A misdemeanor depending on value of property); 18 U.S.C. 1389 (Supp. V 2011) (hate crimes against service members, their immediate families, and their property, a Class C, D, or E felony depending on the particular offense); 18 U.S.C. 1362 (damaging government communication lines, a Class C felony); 18 U.S.C. 2387, 2388 (advising mutiny and other subversive activities, a Class C felony); 18 U.S.C. 2153, 2155 (sabotage, a Class A, B, or C felony depending on the offense); 18 U.S.C. 81 (arson of military or naval stores, a Class A or B felony depending on the particular offense).

federal property rights may not be absolute. That concern is substantial because many military facilities are subject to easements for public roadways or utilities. See, *e.g.*, *Albertini*, 472 U.S. at 698-699 (Stevens, J., dissenting) ("[H]ighways or other public easements often bisect military reservations."); *Higginson* v. *United States*, 384 F.2d 504, 507 (6th Cir. 1967) (discussing a taking of fee simple title to property for a military installation "subject however to existing easements for public utilities, for public railroads, and for pipelines"), cert. denied, 390 U.S. 947 (1968). For example, according to the Department of Defense, at least 36 major military bases in the Ninth Circuit contain roadway easements. See 11-50003 Docket entry No. 37, at 24 (9th Cir. June 25, 2012). Such easements are beneficial to the community, and they often reflect efficient land use. But they may run near sensitive areas of military installations—*i.e.*, areas where the ready ability to exclude civilians, particularly those subject to existing and valid barment orders, is of paramount importance. Cf. *United States* v. *Komisaruk*, 885 F.2d 490, 491 (9th Cir. 1989) (defendant entered Vandenberg and vandalized computer equipment for the space shuttle program).

Moreover, because those easements are generally permanent and not easily monitored, they present a more complex security challenge than the open house at issue in *Albertini*. For example, a would-be terrorist was recorded by an informant "describ[ing] [his] reconnaissance visit to [Marine Corps Base] Quantico and being surprised at how easily he could drive along streets where Marine officers lived"—apparently referring to the uncontrolled side streets off the very road the district court in *Watson* held was not subject to Section 1382. Michael Biesecker, *NC Trial Focuses on*

Plot to Kill Service Personnel, Associated Press, Sept. 21, 2011, http://news.yahoo.com/nc-trial-focuses-plot-kill-personnel-113438890.htm. "'The generals' wives, they're jogging,' he said of Quantico. 'Their children are playing.'" *Ibid.*; see also *United States* v. *Melaku*, 1:12-cr-27 Docket entry No. 20 (E.D. Va. Jan. 26, 2012) (factual basis for guilty plea by defendant, admitting that he shot at the National Museum of the Marine Corps—also located at Marine Corps Base Quantico—while driving on Interstate 95 across that base).

Respondent's approach needlessly puts base commanders to a choice between "clos[ing] access to civilian traffic," thereby "causing substantial inconvenience to civilian residents," or else "continu[ing] to accommodate the convenience of the residents, but only at the cost of surrendering the authority Congress conferred upon [them]" under Section 1382. *Flower* v. *United States*, 407 U.S. 197, 201 (1972) (Rehnquist, J., dissenting). Faced with that choice, some base commanders are likely to restrict access to civilian traffic, and at the least commanders will be far more reticent to grant easements and rights-of-way for the public benefit. Nothing in the text of Section 1382 suggests Congress wanted to put commanders to such an all-or-none choice, and nothing recommends it as a matter of policy.

D. Although This Court Should Not Address Respondent's First Amendment Defense In The First Instance, That Defense Lacks Merit

Respondent defends (Br. in Opp. 29-38) the judgment below on the alternative ground that his conduct was protected by the First Amendment. As respondent recognizes (*id.* at 5 n.22), the court of appeals did not reach that ground. Respondent provides no reason why this Court should depart from its usual practice of re-

versing the court of appeals' incorrect statutory holding and permitting that court to consider respondent's constitutional claim on a remand for further proceedings. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

In any event, as the district court explained (Pet. App. 11a-14a), this Court's precedents foreclose respondent's First Amendment argument. "A military base * * * is ordinarily not a public forum for First Amendment purposes even if it is open to the public." *Albertini*, 472 U.S. at 684; see *Greer*, 424 U.S. at 838. Even assuming that the designated protest area qualifies as a limited public forum, *Albertini* holds that "Section 1382 is content-neutral" and as such "satisfies the First Amendment" because it "serves a significant Government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security." 472 U.S. at 687. As in *Albertini*, "[t]he fact that respondent had previously received a valid bar letter distinguished him from the general public and provided a reasonable grounds for excluding him from the base." *Ibid.*

Respondent would instead analogize (Br. in Opp. 33-34) the facts here to those in *Flower*, *supra*. But as the district court recognized, "[t]he scope of *Flower* has since been clarified by [*Albertini*]." Pet. App. 12a. In particular, "*Flower* establishes [only] that * * * a person may not be excluded from [a public forum] on the basis of activity that is itself protected by the First Amendment." *Albertini*, 472 U.S. at 685-686. *Flower* is beside the point here because respondent does not challenge the validity of the order excluding him from Vandenberg. C.A. E.R. 27. He therefore has not claimed that his exclusion was based on activity protected by the

First Amendment (nor could he, given the nature of his prior conduct). Vindicating the barment order was therefore a permissible, content-neutral basis for his prosecution. See *Albertini*, 472 U.S. at 689; see also Pet. App. 13a ("[Respondent] was prosecuted under 18 U.S.C. § 1382, not for participating in protests at [Vandenberg], but for reentering [Vandenberg] after he had been validly ordered not to do so.").

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 2013

RESPONDENT'S BRIEF

No. 12-1038

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DENNIS APEL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether it violates the First Amendment for a person who was previously barred from a military installation to be convicted under 18 U.S.C. §1382 for peacefully protesting on a fully open public street, which has been designated as a public protest area, on federal property outside the closed military installation.

2. Whether a person who was previously barred from a military installation may be convicted under 18 U.S.C. §1382 for peacefully protesting on a public roadway easement on federal property outside the closed military installation.

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STATEMENT OF FACTS

Dennis Apel was convicted of reentry under 18 U.S.C. §1382 for engaging in peaceful speech activities on a public highway *outside* of a closed military installation, though on land owned by the federal government. Vandenberg Air Force Base ("Vandenberg") is a military base located in Santa Barbara County, about nine miles northwest of the city of Lompoc. It is a closed base in the sense that a person has to enter it through gates that are guarded and there is a green line outside of those gates that Vandenberg has marked as the point at which the base officially begins.

This case involves peaceful speech that occurred entirely outside of the closed installation and on the public side of the green line on a major public road in an area that is officially designated as a protest area. The United States also owns land surrounding the closed installation, including land used for two public highways, Highway 246 and Highway 1. Brief for the Petitioner [hereinafter "U.S. Br."] 3. This case involves speech on Highway 1.

Highway 1 is commonly known as the Pacific Coast Highway, and as its name suggests, it runs throughout California along the coast. The portion of Highway 1 overlying United States property is used by the public to reach Lompoc and Santa Maria. J.A. 64, ¶2. Directly across from Vandenberg's main gate entrance, on the shoulder of Highway 1 and on federally owned land, is a public middle school.

Court of Appeals Excerpts of Record 8 [(hereinafter "C.A.E.R.").

Since 1962, the State of California and the County of Santa Barbara have held an easement and a public right of way over the stretch of Highway 1 that overlaps with the property of Vandenberg Air Force Base. J.A. 35-38. This area of overlap between Highway 1 and Vandenberg is under the concurrent jurisdiction of the State, the County, and the military, with the State and County assuming primary law enforcement authority over the area. J.A. 40; C.A.E.R. 8, 167. This is a completely public road. Access onto the easement is open and uncontrolled. J.A. 78-79. There are no gates or sentries at either end of the easement, or anywhere along the road that travels it. *Id.* Traffic flows freely in both directions at all hours, and traffic lights are situated along the intersections. J.A. 74, 78-79. There are no signs indicating that this stretch of Pacific Coast Highway is different from any other in California or that it is federal land.

Within the area of the easement and just outside the main gate entrance of the closed base is a small area set aside by Vandenberg for public protests, pursuant to a base policy which dates back to 1989.[1]

---

[1] That policy states in full:

People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the Intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force

(Continued on following page)

J.A. 5[illegible] C.A.E.R. 2, 7. This "designated protest area" is bo[illegible]ed by Highway 1, Lompoc-Casmalia Road, and a painted green line across California Boulevard, which together with Highway 1 and Lompoc-Casmalia Road, form the intersection at the main gate of Vandenberg. J.A. 52-53, 57, 74.

The painted green line on California Boulevard separates the closed military installation from the open public road that is Highway 1. J.A. 91; C.A.E.R. 7-8, 261-62. The green line is the installation's boundary; that is where the easement ends and the installation begins. *Id.* Similarly, at the green line, concurrent jurisdiction of the State and County ends; exclusive military jurisdiction and control begins. *Id.* In addition, the green line marks the start of California Boulevard, an access road that leads to

---

> Base, California. The Air Force is obligated to insure that peaceful protests do not result in unsafe vehicle and people congestion around the Main Gate. If necessary, restrictions may be placed on peaceful protesters who encumber the roadways or engage in activities which can result in unsafe conditions for themselves or others. Protest demonstrations may be curtailed in this area when they materially interfere with or have a significant impact on the conduct of the military mission of the U.S. Air Force.

Vandenberg adopted this policy statement pursuant to the stipulated settlement of a lawsuit in federal court, *Fahrner v. Olivero*, CV 88-05627-AWT(Bx). J.A. 45-50. Issuance of the policy statement was an express term of the settlement. J.A. 46, ¶4. The settlement was approved by Judge A. Wallace Tashima and filed upon his order. C.A.E.R. 52. Thus, the agreement remains judicially enforceable.

Vandenberg's inner controlled entry gate, approximately 200 yards away. J.A. 79. Moreover, the Air Force's own description of Vandenberg is clear that the closed base is defined by the green line: "Vandenberg AFB is a closed base and non-military and non-DoD personnel are prohibited from entering the installation without the express permission of the installation commander or his/her designee." J.A. 57. The public roads outside of the base are not, by this definition, part of the closed installation.

Just behind the green line, down the California Boulevard access road, a visitors' center receives members of the public wishing to visit the base. J.A. 79. Behind the visitors' center there is a public bus stop serviced by the City of Santa Maria. J.A. 79; C.A.E.R. 8. Past the visitors' center, the access road continues until it arrives at the inner gate, which consists of a guard shack and barricade. *Id.* This is where visitors and Air Force personnel gain "formal entry into the base." *Id.* Beyond this formal controlled-access entry point lies the base proper and all its operations and facilities, including its missile- and space-launch centers. U.S. Br. 2.

On the other side of the green line is Highway 1. C.A.E.R. 7-8. All of the speech activity that gave rise to this case occurred in this area: a small segment of the Pacific Coast Highway running outside and past the closed installation at Vandenberg Air Force Base. C.A.E.R. 8-9. More specifically, the speech occurred in the designated protest area that is located on the highway. *Id.*

Dennis Apel has been a visitor to the designated protest area at Vandenberg for 14 years, joining in peaceful protests to the military's activities. C.A.E.R. 144. Apel has twice been issued letters barring him from entering the Vandenberg installation, the first time in 2003 for trespassing and vandalizing base property, and the second time in 2007 for trespassing. J.A. 59-66 (barment orders).

On three separate occasions in 2010, Apel entered the designated protest area on Highway 1 to engage in peaceful demonstrations; he did not cross the green line or enter the closed part of the military installation. On each occasion, Apel was cited for violating 18 U.S.C. §1382 and escorted away. C.A.E.R. 8-9. He conducted himself peacefully at all times, did not interfere with traffic or military operations, and left without incident after being cited. *Id.* The United States does not dispute this. Nonetheless, Apel was convicted before a magistrate judge of three counts of violating 18 U.S.C. §1382 for reentering the designated protest area after having been previously barred from the base for trespassing. C.A.E.R. 1-2.

The district court affirmed and Apel appealed. Pet. App. 1a-2a, 5a-15a. Relying on its recent decision in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), the Ninth Circuit reversed Apel's convictions. The Court of Appeals held that the existence of a public road easement over the area of Apel's alleged reentry deprived the government of the exclusive right of possession necessary to sustain a conviction under §1382. Pet. App. 1a-2a. The government petitioned for

rehearing en banc. Pet. App. 3a-4a. The petition was denied. *Id.*

SUMMARY OF ARGUMENT

Dennis Apel was convicted of violating 18 U.S.C. §1382 for speech that occurred on a public road, Highway 1, in an area which has been officially designated by Vandenberg as a protest area. Section 1382 was deemed applicable to Apel's peaceful protest activity solely because this stretch of Highway 1 is owned by the federal government, even though an easement has been granted for its public use to the State of California and the County of Santa Barbara. The area where Apel was protesting is outside of the closed military installation at Vandenberg Air Force Base; all of Apel's speech activities for which he was convicted were on the public side of the green line separating the closed base from the area that is freely open to the public.

The decision reversing Apel's convictions should be upheld for two reasons. First, Apel's convictions violate the First Amendment. Public roads, such as Highway 1, long have been recognized as quintessential public forums. *Schneider v. State*, 308 U.S. 147, 163 (1939); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). At the very least, this stretch of Highway 1 is a designated public forum because the government, pursuant to a consent decree, has opened it to speech and protest activities. J.A. 45. Apel's peaceful speech,

on a street that is a traditional public forum or at least a designated public forum, is protected by the First Amendment.

Prior decisions of this Court have upheld convictions under §1382 for speech activities occurring *within* the confines of a closed military installation. *United States v. Albertini*, 472 U.S. 675 (1985). But never has this Court upheld a conviction under §1382 for speech occurring *outside* of a closed installation merely because the military owns the land on which the speech occurred. Quite the contrary, in *Flower v. United States*, 407 U.S. 197, 198 (1972), this Court held that §1382 did not apply when the speech occurred on a public road, even though the road was on land owned by the United States.

Second, the Court of Appeals correctly interpreted §1382 as applying only to land over which the United States has exclusive possession and control. By its express terms, §1382 applies to "military installation[s]." Contrary to the government's assertion, that term has never been understood to include all land owned by the military regardless of how it is used. Rather, a military installation is defined by the fact that it is land the government uses for military purposes. For that reason, a "military installation" also has clearly defined boundaries and is subject to military control. Prior to this case, even the government recognized as much, as the Air Force has consistently construed the language of §1382 to require exclusive possession and control by the military.

A public road outside of a closed installation, even on land owned by the military, is not a part of the "installation" and not under the control of the commander. At the very least, any doubt over the meaning of §1382 must be resolved in Apel's favor, as the statute must be interpreted to avoid the serious constitutional problems raised by the government's view and because under the rule of lenity a criminal statute's ambiguity must be decided in favor of a criminal defendant.

Finally, there is no foundation for the government's claim that national security would be compromised if §1382 is interpreted to require exclusive government possession and control. Vandenberg is a closed installation that must be entered through a guard gate. Highway 1, and the designated protest area, are outside of this installation and on the side of the green line that delineates public space. No sensitive military activities occur in that public area. If they did, the base commander would be required by law to include it in the area of the controlled military installation. The government offers no reason to believe that the closed, guarded perimeter is not sufficient to protect military security. Moreover, the government's interpretation of §1382 is unnecessary because there are a plethora of other federal laws and state statutes that could be used to punish any harmful behavior.

Apel was arrested and convicted for exercising his constitutional right to peacefully protest the

military's activities. Neither the First Amendment nor §1382 permits this result.

ARGUMENT

I. The Decision Below Should Be Affirmed Because Dennis Apel's Conviction Violated the First Amendment.

Dennis Apel was convicted for engaging in speech on a busy public road, in a designated protest area, outside of the closed installation at Vandenberg Air Force Base. His convictions violate the First Amendment. At the very least, this Court must interpret §1382 to avoid the serious constitutional questions that would arise under the government's expansive interpretation of the statute.

A. Apel Was Convicted for Engaging in Peaceful Speech in a Traditional Public Forum.

At the time of his arrests, Apel was peacefully demonstrating against the military's policies in the designated protest area beside Highway 1. He was on the public road outside of the closed military base and outside of the green line that the military has designated as the perimeter of the base. There can be no dispute that Apel was engaged in First Amendment activity. *United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing . . . [is an] expressive activit[y]

involving 'speech' protected by the First Amendment.").

Apel was protesting in a place where the First Amendment has particular force: a public street. This Court long has stressed that "[s]treets are natural and proper places for the dissemination of information and opinion." *Schneider v. State*, 308 U.S. 147, 163 (1939). In *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), this Court famously explained:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Thus, the law is clear that "[o]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

The stretch of Highway 1 adjacent to Vandenberg's main gate entrance is, by any measure, a public street. Everywhere else along its route, which includes most of the Pacific coastline, Highway 1 is a public street. This particular segment of Highway 1 is no different merely because it happens to be on federally owned land adjacent to the closed installation at Vandenberg. Motorists and pedestrians travel this

portion of Highway 1 just as freely as they traverse it throughout the state. There are no gates or sentries at the points of entry, or checkpoints anywhere in between. There are no signs indicating that it is a place where speech is restricted in any way, or that anything is different about this stretch of Highway 1 compared to the rest of its length in California. People come and go as they please.

The government properly identifies *Flower v. United States*, 407 U.S. 197 (1972), and *United States v. Albertini*, 472 U.S. 675 (1985), as the decisions of this Court applying §1382 in the context of peaceful expression on military bases. U.S. Br. 27. However, *Albertini* is readily distinguishable because it involved speech *on the military base*, whereas this case involves speech on a public road *outside* of the closed base. The critical and controlling precedent is *Flower*.

In *Flower*, the Court summarily reversed the conviction under §1382 of a civilian who was subject to a bar order and "quietly distribut[ed] leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio." *Id.* at 197. Like Highway 1, New Braunfels Avenue "was a completely open street." *Id.* Like Highway 1, it "was a public thoroughfare no different than other streets in the city." *Albertini*, 472 U.S. at 684-85 (describing the facts in *Flower*). No sentry or guard was posted at either entrance or anywhere along the street. *Flower*, 407 U.S. at 198. The street was open to unrestricted civilian traffic 24 hours a day. *Id.* Public transit vehicles, including buses, used the street as freely as did private vehicles. *Id.* As this Court held, "Under such

circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street." *Id.*

The only difference between Highway 1 and New Braunfels Avenue is the manner by which they became public streets. New Braunfels Avenue was a public street because the commander of Fort Sam Houston had left it alone and permitted the public to pass freely through the gated entryway and into the confines of the installation. *United States v. Flower*, 452 F.2d 80, 90 (5th Cir. 1972). Highway 1, which is *outside* the gates and confines of Vandenberg's installation, is a public street because the Air Force ceded it to the public for that very purpose by granting an easement to the State and the County over 50 years ago. J.A. 35-38. If New Braunfels Avenue was a public street, Highway 1 is even more so. This Court was emphatic that "[t]he First Amendment protects petitioner from the application of §1382 under conditions like those of this case." *Flower*, 407 U.S. at 199.

In sharp contrast, *Albertini*, upon which the government relies, did not involve speech on a public road outside a military base, but instead was about expression *on* a closed military base. An open house was held on Hickam Air Force Base in Hawaii and Albertini, who was subject to a bar order, was convicted because he "reentered" the base during the

time of the open house. *Albertini*, 472 U.S. at 680. In concluding that §1382 applies "to open houses on military bases," this Court emphasized that it was considering a situation of "reentry to closed military bases." *Id.* at 682. The Court also emphasized the limits of its holding by carefully distinguishing between *Albertini* and *Flower*. In the Court's words: "*Flower* establishes that where a portion of a military base constitutes a public forum because the military has abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression, a person may not be excluded from that area on the basis of activity that is itself protected by the First Amendment." *Id.* at 685-86 (internal citations omitted). That is exactly this situation: the military has relinquished any right to limit civilian traffic on Highway 1 and even has designated it as a protest area.

Flower and *Albertini* thus draw a common sense distinction, which is controlling in this case: peaceful speech on a public road outside of a closed military base, though federal land, cannot be banned based on a bar letter; but the government may apply a bar letter to prohibit speech on the closed base itself, even during an open house.[2]

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[2] In fact, the United States has urged this Court to adopt exactly this distinction. In its brief to this Court in *Albertini*, the United States declared: "We note, in addition, that respondent has 'substantial alternative' means of expressing his views. He has the same rights as any other member of the public for

(Continued on following page)

This distinction is in accord with decades of Supreme Court decisions holding that public streets are the quintessential public forums. "'Public places' historically associated with the free exercise of expressive activities, such as streets . . . are considered, without more, to be 'public forums.'" *Grace*, 461 U.S. at 177. As this Court has declared, public streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Highway 1 is such a public forum.

It does not matter that Highway 1 is a public street only by virtue of an easement. It is no less a public forum for purposes of the First Amendment. As the Tenth Circuit has stated, "Easements are . . . constitutionally cognizable property interests. . . . [H]olding that an easement cannot be a forum would lead to the conclusion that many public streets and sidewalks are not public fora. Public highways or streets are often easements held for the public, with title to these property interests remaining in abutting property owners." *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122-23 (10th Cir. 2002). Thus, the Air Force may own the land crossed by Highway 1, but its mere title to that land cannot divest the street of the public

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example, *to engage in a demonstration just outside the gate of a military installation.*" Brief for the United States, *Albertini*, 1985 WL 669820 (U.S.), 34 n.15 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53-54 (1983) (emphasis added)).

character afforded it by the easement. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 947 (9th Cir. 2001) ("The mere retention of some property interest in the parcel does not affect the public nature of the dedicated use of the sidewalk.").

Nor does it matter that Highway 1 abuts a closed military installation. A public street remains a public forum even when, as here, it is adjacent to non-public land. As this Court declared: "Traditional public forum property occupies a special position in terms of First Amendment protection *and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression.*" *Grace*, 461 U.S. at 180 (emphasis added). In *Grace*, this Court held that the public sidewalks forming the perimeter of the Supreme Court's grounds are a public forum, even though the Supreme Court building and its grounds abutting the sidewalks "had not been traditionally held open for the use of the public for expressive activities." *Id.* at 178.

Relying on this Court's decision in *Greer v. Spock*, 424 U.S. 828 (1976), the government argues that Highway 1 is not a traditional public forum because it is part of a military base. *See* U.S. Br. 4, 27. *Greer* did not involve, and this Court did not discuss, §1382. As a matter of statutory interpretation, for the reasons set forth in Part II below, the government's reading of §1382 is incorrect. But, even if Highway 1 is included in what is covered by §1382, the government could

not unilaterally deprive the road of its public character simply by classifying it as part of a non-public forum parcel of property. *Grace*, 461 U.S. at 180 (holding that the inclusion of the sidewalks surrounding the Supreme Court within the statutory definition of non-public "Supreme Court grounds" did not deprive the sidewalks of traditional public forum status). Rather, the Court must look to the objective characteristics of the road to determine whether it functions like a traditional public street. *Id.*; *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). *Greer* held that the roads and sidewalks located *within* Fort Dix, over which the Federal Government exercised exclusive jurisdiction, did not qualify as traditional public forums. 424 U.S. at 830, 837. But as this Court subsequently made clear, *Greer*'s holding hinged on the fact that "the streets and sidewalks at issue were located *within* an enclosed military reservation . . . and were thus separated from the streets and sidewalks of the city itself." *Grace*, 461 U.S. at 179 (emphasis added).

Here, the situation is entirely reversed. Unlike the roads in *Greer*, Highway 1 is clearly located outside of the closed military installation. There is even a green line painted on the ground to make clear to all where the public road ends and the closed military base begins. The roadway itself is not closed in any way, and traffic is unimpeded. There are no gates, sentries, or checkpoints to suggest the road is anything other than an ordinary public road. It lies on an unenclosed and uncontrolled portion of federally owned land.

Like the sidewalks in *Grace* and the public road in *Flower*, the portion of Highway 1 at issue here is indistinguishable from any portion of Highway 1, or other public road, not on federally owned land. Apel's peaceful speech on such a public road cannot be punished without violating the First Amendment.

B. At the Very Least, Apel's Speech Occurred in a Designated Public Forum.

In the alternative, the protest area where Apel was demonstrating is a designated public forum. A "designated" public forum is a place that the government could close to speech, but one that the government voluntarily and affirmatively opens to speech. The Court has recently explained that governmental entities create designated public forums when "'government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose; speech restrictions in such a forum 'are subject to the same strict scrutiny as restrictions in a traditional public forum.'" *Christian Legal Society v. Martinez*, 130 S.Ct. 2971, 2984 n.11 (2010) (citations omitted).

Designated public forums are created by purposeful governmental action. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. at 677. Government intent is the key factor in determining whether a designated public forum has been created. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S.

788, 802 (1985). That intent must be discerned from the government's policy and practice. *Id.*

Here, the government's intent to create a designated public forum could not be clearer. Vandenberg's 1989 Policy Statement provides in relevant part: "People involved in peaceful protest demonstrations will be permitted to assemble and protest in the concurrent jurisdiction areas adjacent to the Intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate (Santa Maria Gate) of Vandenberg Air Force Base, California." J.A. 46, ¶4.

Vandenberg has consistently observed this policy statement since its adoption 24 years ago. The government does not argue otherwise. The policy and practice of the government evinces a plain intent to create a designated public forum in the designated protest area. Indeed, it is difficult to imagine a clearer or more explicit creation of a designated public forum.

C. The Application of §1382 to a Public Road Outside a Closed Military Base Serves No Significant Government Interest.

In either a traditional public forum or a designated public forum, "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a

significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. at 177 (internal quotation marks and citation omitted). Therefore, Apel may be convicted under §1382 for his speech activities on Highway 1 only if the government has an important interest in enforcing the statute against him.

Highway 1 is a public road that travels across military-owned property but is outside the boundaries of the installation. This road is outside the green line, outside the main gate entrance, outside the controlled access entry point, and outside the enclosed installation that is Vandenberg proper. Further, it lies on an easement given to the concurrent jurisdiction of the State and County for exclusive public use. Excluding Apel from a public road such as this serves no identifiable government interest. The government cites security. U.S. Br. 22-26. But it speaks to this interest in generalities and shows no harm whatsoever risked by Apel's peaceful protests on Highway 1.[3] The government introduced no evidence at trial to support this contention, and the record contains none. As aptly expressed by Justice Marshall, "[T]he First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. Those interests cannot

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[3] The government's argument that §1382 should be applied to a public road that has been designated as a protest area outside of a closed military installation because of concerns over national security is discussed below in Section II.D.

be invoked as a talismanic incantation to support any exercise of power." *Greer*, 424 U.S. at 852-53 (Marshall, J., dissenting).

Under the terms of the bar order, Apel was allowed to travel on Highway 1, but not to engage in peaceful protest. J.A. 64. The government has not shown, and cannot show, that Apel's peaceful speech activities on Highway 1 threatened base security or that Apel's exclusion helped maintain it. *See Grace*, 461 U.S. at 182 ("There is no suggestion . . . that appellees' activities in any way obstructed the sidewalks or access to the [Supreme Court] Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds."). Absent that showing, Apel's mere proximity to the base as a result of his presence on an adjoining public street cannot give rise to a significant government interest in security.

There is no plausible argument that excluding barred civilians from a public street that is *outside* an enclosed military base, and outside the green line which the military has drawn for the base, serves a significant government interest. The government, of course, can draw the green line and put the guard gate wherever it needs to in order to fulfill its functional and security needs. This case is not *Greer*, where all the roads at issue were *inside* the enclosed military reservation. *Greer*, 424 U.S. at 830. Nor is this case *Albertini*, where the barred defendant used the occasion of an open house event to make his way

inside the gates of a normally closed military base. *Albertini*, 472 U.S. at 678; *see also United States v. Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011) ("*Albertini* did not address the scenario where a military base or area thereof is *permanently* open to the public by virtue of a public easement.") (emphasis in original).

Even barred, Apel retains the First Amendment right to be present and to speak peacefully on Highway 1, a public road outside Vandenberg's exclusive jurisdiction and beyond the confines of its installation. So long as Apel is on that public road, his peaceful protest activities have the protection of the First Amendment.

D. The Ninth Circuit Decision Should Be Affirmed Based on the First Amendment.

Apel raised the First Amendment as a defense in both the District Court and the Court of Appeals. U.S. Br. 5. Although the Ninth Circuit decided the appeal on statutory grounds without reaching the First Amendment issue, Apel may defend the judgment on any ground properly raised below. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals."); *Langnes v. Green*, 282 U.S. 531, 538-39

(1931) ("But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record.").

The government argues that the First Amendment issue should be remanded to the Ninth Circuit for consideration. U.S. Br. 25. There is no reason for this Court to do so. The issue was raised and fully briefed below. It is therefore completely appropriate for this Court to consider it, even though the Ninth Circuit did not discuss it.

Remanding this case to the Ninth Circuit will gain nothing. A criminal trial already occurred so no further development of the factual record is possible or necessary. The legal issues are not novel or of the sort where this Court would benefit from the consideration of a lower court. This case presents a classic question of First Amendment law and is controlled by this Court's decision in *Flower*.

Apel's conviction cannot stand because it was for peaceful speech on a public road which is clearly protected by the First Amendment.

II. The Decision Below Should Be Affirmed Because Apel's Speech Did Not Violate 18 U.S.C. §1382.

The government contends that §1382 applies expansively to public highways located outside the entrance to closed military installations solely because the United States owns the land. The government asserts that the scope of §1382 is coextensive with the

federal property line and thus applies to all places inside it, regardless of their public character. Under the government's reasoning, §1382 applies to the public school, the Amtrak station and the public beach located on Vandenberg property (J.A. 64, 93), and thereby vests in the installation commander the power to summarily exclude, detain and subject to prosecution civilians he has barred from those places.

Nothing in the text, purpose, or history of §1382 supports the government's broad construction. By its plain terms, §1382 applies to military installations, not public roads, and reentry can be prosecuted only if it occurs on a military installation under military command. Nothing in §1382, or its history, suggests that Congress intended to criminalize entries onto uncontrolled public roads where no military facilities are located and no military operations are performed. And nothing suggests that Congress intended to confer upon military commanders the power to summarily exclude under pain of criminal prosecution civilians who use those roads.

The government contends that the Ninth Circuit has improperly engrafted onto §1382 a requirement that is not found in the statute. That is incorrect. The Ninth Circuit's exclusive possession and control requirement derives directly from the text of §1382 and is used to determine what constitutes a "military installation" under the statute. Moreover, it has been adopted by the Air Force and the United States Attorneys' Manual, and has been applied in various forms without difficulty by the lower courts for nearly 60 years.

Indeed, it is the government that seeks to alter the statute to add public roads to the areas where §1382 applies. No court has ever extended §1382 to uncontrolled public roads permanently dedicated to civilian use, and no court ever has defined "military installations" to include such places.

Furthermore, basic principles of statutory interpretation – such as the need to interpret statutes to avoid constitutional doubts and the rule of lenity – strongly support interpreting §1382 to apply only to property under the exclusive possession and control of the federal government. Finally, contrary to the government's assertion, refusing to apply this misdemeanor law to a public road that the government itself has designated as a protest area outside of a closed military installation would pose no risk to national security.

A. The Text, History, and Purpose of §1382 Support Limiting Its Application to Areas Where the Military has Exclusive Possession and Control and Not to Public Roads Where an Easement for Public Use Has Been Granted.

1. The term "military installation" does not include public highways where no military operations are performed.

By its terms, §1382 applies to reentries upon "military installations" – that is, facilities used for military purposes. Nothing in §1382 applies to entries upon highways used and occupied by the general

public, or other public areas not subject to military control, just because the government owns the underlying land. Rather, the term "military installation" in §1382, and every other term mentioned in the statute, has been traditionally defined in terms of exclusive military possession and control.

As originally enacted, §1382's predecessor was set forth in a Chapter entitled "OFFENSES AGAINST THE OPERATIONS OF THE GOVERNMENT" and provided:

> Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

Act of Mar. 4, 1909, Pub. L. No. 60-350, §45, 35 Stat. 1088, 109.

Congress, in this statute, did not define military reservation, army post, fort or arsenal. Where, as here, a statute does not explicitly define a term, statutory interpretation should be grounded upon "one cardinal canon above all others": ascribing ordinary words their ordinary meaning in keeping with common understanding. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Historically, these terms were commonly defined as property set apart for military

occupation and use. "Post," for example, meant "[a] place where armed men are permanently quartered for defensive or other purposes; a fort. Also (U.S.) the 'occupants, collectively, of a military station: a garrison.'" Oxford English Dictionary 1162 (1933) [hereinafter "OED"]; *see also* 1909 Army Regulations, Art. XXVII, Military Posts and Reservations, Posts, §200 ("Permanent posts will be styled 'forts,' and points occupied temporarily by troops 'camps.'").[4]

"Reservation" was historically defined as land withdrawn from public use and set apart for some exclusive use and occupation. *See* OED 511 ("A tract of land set apart by Government for some special purpose, or for the exclusive use of certain persons, esp. of a native tribe."); Black's Law Dictionary 1010 (1891) ("[A] tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc.") A "military" reservation meant a reservation

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[4] Similarly, "Fort" meant "[a] fortified place; a position fortified for defensive or protective purposes, usually surrounded with a ditch, rampart, and parapet, and garrisoned with troops; a fortress." OED 472; Black's Law Dictionary 512 (1891) (" '[S]omething more than a mere military camp, post, or station. The term implies a fortification, or a place protected from attack by some such means as a moat, wall, or parapet.' "). "Arsenal" meant "[a] public establishment for the manufacture and storage, or for the storage alone, of weapons and ammunitions of all kinds, for the military and naval forces of the country." OED 466; Black's Law Dictionary 91 ("Store-houses for arms; dock-yards, magazines, and other military stores.").

"pertaining to soldiers; used, performed or brought about by soldiers." OED 438.

Thus, the terms all refer to areas under the government's possession and control. None of these terms includes civil roads located outside of places occupied and used by the military – whether it be a post, fort, arsenal, or reservation.

In 1948, Congress codified §1382 and inserted "naval or Coast Guard" between the words "military" and "reservation," and added the terms "yard, station, or installation" to the list of places covered by §1382. It now applies to any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation. The amendment did not change or broaden the nature of the military facilities covered in §1382; it simply added new types of military facilities to the exclusive list of covered properties. Like reservation, post, fort and arsenal, these new terms, in context, relate to nonpublic places that are set apart for specialized occupation and use. At the time of the amendment, "yard" meant an "'enclosure' the particular character of which is to be inferred from the context." OED 15, 16. "Station" meant "[a] place where soldiers are garrisoned, a military post" or "a place at which ships of the Navy are regularly stationed." OED 860.

"Installation" meant "[t]he action of setting up or fixing in position for service or use (machinery, apparatus, or the like); a mechanical apparatus set up or put in position for use." OED 348. Later, it acquired

an additional, more specialized meaning in the military context. *See, e.g.*, Merriam-Webster's Collegiate Dictionary 648 (2003) ("[S]omething that is installed for use" as "a military camp, fort or base"); OED (2013) (noting 2009 draft addition defining "installation" as "[a] military or industrial facility, base, or complex.").

In context, then, "installation" contemplates some fixed place or apparatus for use and, like the other places listed in §1382, it is expressly modified by the terms "military, naval or Coast Guard."[5] Thus, "military installation" plainly means a fixed place or apparatus established for military, not public, use.[6]

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[5] "Military" use is, by definition exclusive of public "civil" use. OED 438 (defining "military" as "having reference to armed forces or to the army; adopted to or connected with a state of war; distinguished from civil, ecclesiastical, etc."); Webster's New International Dictionary 1370 (1911) (military means "belonging to, engaged in, or appropriate to, the affairs of war" and "[p]erformed or made by soldiers; supported by armed forces – as opposed to civil.")

[6] While "military installation" is not defined in §1382, other statutory definitions expressly contemplate military activities and facilities; none includes public highways. *See, e.g.*, 10 U.S.C. §2801(4) ("'[M]ilitary installation' means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department."); 10 U.S.C. §2687(g)(1) ("'[M]ilitary installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility, . . . Such term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects."); 10 U.S.C. §2667(i)(3) (same definition).

The legislative history supports this narrow reading and indicates that §1382 should not be expansively applied to areas beyond military installations where the military has exclusive possession. Nothing in the legislative history of §1382 indicates that Congress intended to punish civilians on public roads outside the confines of closed military installations. The purpose of §1382 was to exclude spies from forts and arsenals, protect military secrets, and protect soldiers from being taken off the reservation onto illicit places surrounding the encampment. *Albertini*, 472 U.S. at 685 (Stevens, J., dissenting) (explaining legislative history of §1382). In rejecting a proposed amendment to expand the statute to apply to soldiers in national soldiers' homes who were similarly targeted, legislators agreed that the law was designed only to "protect the property of the Government so far as it relates to national defense." 42 Cong. Rec. 689 (1908) (remarks of Mr. Payne). Section 1382 was meant to give base commanders authority only over their military installations and not public roads dedicated to civilian use.

The government contends that §1382 applies to public roads, which are not used for military purposes, located outside the entrance of a closed military installation. It contends that a "military installation" includes any government-owned property designated as such by the military regardless of the actual character of the place. If Congress had intended §1382 to apply so broadly, then it could have made its application expressly coextensive with government

property lines. It did not do so. Every place enumerated in §1382 relates to military occupation and use, not to property boundaries. The government's attempt to broadly apply this statute is unjustified by the text and the legislative backdrop against which this law was enacted.

Thirty-three years before §1382's predecessor was enacted, this Court defined "military station" narrowly and rejected a broad construction of the term. In *United States v. Phisterer*, 94 U.S. 219, 222 (1876), this Court considered whether "military station" included a soldier's home where no military operations took place. This Court noted that the term "station" could be given a broad meaning, but refused to do so, instead recognizing that "station" should be construed in light of its military context and thus given a narrow, technical meaning. *Id.* The Court stated:

> A 'military station' is merely synonymous with the term 'military post,' and means a place where troops are assembled, where military stores, animate or inanimate, are kept or distributed, where military duty is performed or military protection afforded – where something, in short, more or less closely connected with arms or war is kept or is to be done.

Id. The Court thus confined the interpretation of military station and post to places dedicated to military purposes and controlled by the military. The Court accordingly held that the soldier's home,

located in a country village, was not a military post or station because it was not a place controlled or possessed by the military where something closely connected with arms or war was kept or performed. *Id.* at 223.

Consistent with *Phisterer*, "military installation," like "military station," must be construed in accordance with its common meaning and not expansively to include public highways outside an enclosed area where military functions are performed. Moreover, because *Phisterer* was decided decades before Congress acted, it must be presumed that Congress adopted this Court's holding and reasoning. *Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" (citations omitted)). Further, Congress amended §1382 once in 1940 to clarify its territorial scope and again in 1948 to expand the list of covered military places, but it never added any language manifesting an intent to cover public roads where no military functions are performed.

Congress's choice is particularly significant given the long line of cases, starting with *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948), requiring absolute ownership or an exclusive right of possession by the United States as a prerequisite for §1382. *Id.* at 651 ("[P]roof of criminal jurisdiction of the road was not enough. Sole ownership or possession, as against the accused, had to be in the United States or

there was no trespass."). This line of cases includes many holding that the military must exercise control over the area in question to preserve its right to exclude others.[7] Mere title to property without actual possession and control is simply not enough.[8] The

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[7] *See, e.g., United States v. Vasarajs*, 908 F.2d 443, 446-47 (9th Cir. 1990) (holding *Albertini* supports view that the government must have control, in addition to "absolute ownership, or an exclusive right to the possession" of the property in question, to preserve the right to exclude others pursuant to §1382); *United States v. Mowat*, 582 F.2d 1194, 1206 (9th Cir. 1978) (accepting, in light of precedent, the parties' stipulation that the government "was required to prove, as an element of the offense, absolute ownership or the exclusive right to the possession of the property upon which the violation occurred"); *United States v. Packard*, 236 F. Supp. 585, 586 (N.D. Cal. 1964) (holding that government met burden of establishing "absolute ownership, or an exclusive right to the possession, of the road"), *aff'd*, 339 F.2d 887 (9th Cir. 1964) (affirming "for the reasons stated in the opinion of the trial court."); *Holdridge v. United States*, 282 F.2d 302, 306-08 (8th Cir. 1960) (holding that "exclusive possession of the premises in the government has been appropriately established" where public rights of use in roads traversing a military base was extinguished in condemnation proceeding).

[8] *See, e.g., United States v. Renkoski*, 644 F. Supp. 1065, 1066 (W.D. Mo. 1986) (citing *Albertini* for proposition that "[m]ere title to real estate does not allow issuance by the Government of a 'ban and bar' notice. The area in question must be controlled," but affirming conviction where protestors crossed cordoned-off area); *cf. United States v. McCoy*, 866 F.2d 826, 830-32 (6th Cir. 1989) (stating that the "existence of Wurtsmith Air Force base does not depend on the strength of the government's legal title"; thus a military airstrip "possessed and operated by the United States" would be "off limits to anyone barred from the base" regardless of the source of title and affirming conviction where a protestor crossed a line marking the *de facto* boundary of the

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exclusive possession and control requirement is not an extra-statutory requirement; rather, it is a means of determining what constitutes a "military installation" within the meaning of §1382. And it is wholly consistent with *Phisterer*'s definition of "military station" that military posts be places where military operations rather than civil functions are performed.

As one commentator observed: "It must be concluded that what Congress intended by the term 'military installation' was closely akin to the definition given by the Supreme Court in *Phisterer*." Lieutenant Colonel Jules B. Lloyd, *Unlawful Entry and Re-Entry into Military Reservations in Violation of 18 U.S.C. §1382*, 53 Mil. L. Rev. 137, 140-41 (1971).

The government provides no authority for the proposition that "military installation" includes public highways. There is none.

2. Installation commanders, under §1382, may summarily bar civilians only from areas within their command, which are military installations in the exclusive possession and control of the military.

Section 1382 confers upon installation commanders the power to exclude civilians from the area of

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installation on the installation driveway that was "'within the control of the military'").

their command – that is, the area they control.[9] Control, in this context, means physical control and dominion over the area of command: the area of the military's right of exclusive possession.

The Vandenberg Air Force Base installation commander does not "command" Highway 1 because he does not control access to it. An installation commander's command over military functions is necessarily exclusive. *See, e.g.*, Joint Chiefs of Staff, Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms (Sept. 15, 2013) ("command" means "[a] unit or units, an organization, or an area under the command of one individual"); *id.* ("area command" means "[a] command which is composed of those organized elements of one or more of the Armed Services, designated to operate in a specific geographical area, which are placed under a single commander").[10]

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[9] Command is defined as:

> "1. The right or authority to order, control, or dispose of; the right to be obeyed or to compel obedience: as, to have *command* of an army. . . . 2. Possession of controlling authority, force, or capacity; power of control, direction or disposal. . . . 3. A position of chief authority: a position involving the right or power to order or control, as General Smith was placed in *command*.

The Century Dictionary 1124-25 (1889).

[10] Commanders command military functions, not civil ones. *See, e.g.*, Joint Chiefs of Staff, Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms (Sept. 15, 2013) ("command" means "[t]he authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment").

That is why installation commanders have virtually unfettered control over the property and troops *within their command*, and the power to control entry. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961) (noting that power to bar an individual from an installation, or an area controlled by the military, is an inherent concomitant of command); *see also* 32 C.F.R. §809a.2(b) ("Each [Air Force installation] commander is authorized to grant or deny access to their installations, and to exclude or remove persons whose presence is unauthorized.").

Although post commanders have authority over military personnel regardless of their location, post commanders have power over civilians only if they are located within the confines of a controlled post. That is, installation commanders have power over civilians only in the areas they control. Mil. R. Evid. 315(c)(2)(3), (d)(1) (2012) (authorizing a commander to search "anyone subject to military law or the law of war wherever found" and other "persons or property situated on or in a military installation, . . . , or any other location under military control," and defining "Commander" as one "who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over the person subject to military law or the law of war."). Historically, post commanders were empowered to summarily punish individuals, including civilians, by ordering them out of the camp. Burress M. Carnahan, Comment – Article 15 Punishments, 13 JAG L. Rev. [iv], 270

(1971). There is no indication that Congress intended to extend this power over civilians outside the confines of an exclusively controlled military post.

Here, having relinquished the power to control access to Highway 1, and having granted the public a vested right in civil use and occupation, the military relinquished its right to exclude civilians from Highway 1 so long as the easement exists. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d at 946 ("Although the owner of the property retains title, by dedicating the property to public use, the owner has given over to the State or to the public generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' the right to exclude others.") (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994)); *see also Marsh v. Alabama*, 326 U.S. 501, 503 (1946) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."). The area of the easement cannot be considered part of the installation commander's area of "command." Thus the power to exclude civilians is necessarily extinguished. Extending §1382 to public highways that are not controlled or possessed by the military would permit, contrary to Congress's intent, criminal punishment of civilians who unknowingly or unwillingly enter military installations.

The government relies on *Cafeteria Workers* to assert that the term "military installation" includes

public highways because it covers any place under military command. U.S. Br. 12-13. That reliance is misplaced. *Cafeteria Workers* involved the summary exclusion of an individual who attempted to enter a closed base without satisfying security requirements, and the Court's decision rested squarely on the power of the commander to control access to a closed base. Having relinquished the exclusive power to control public access to the easement on Highway 1, the government cannot now claim that the Highway 1 easement is part of a military command. Further, the statute punishes those found "within" a military installation. The plain meaning of "within" necessarily contemplates fixed, controlled boundaries, and undercuts the government's argument that §1382 applies to public roads outside the marked boundaries of a military-controlled installation.

Use of the easement is not at the commander's exclusive discretion and thus it cannot be summarily revoked. *Cf. Greer*, 424 U.S. at 838 ("A necessary concomitant of the basic function of a military installation has been the 'historically unquestioned power of [its] commanding officer to summarily exclude civilians from the area of his command.'") (quoting *Cafeteria Workers*, 367 U.S. at 393). *Greer* does not compel a contrary result. The activity there took place *within* the confines of a gated military reservation and thus on property occupied, controlled and used by the military for military purposes. *Albertini*, too, involved conduct *within* the confines of a closed military base, which was opened, only temporarily, to the

public. Such deference to internal military affairs has no application to public highways that are not under exclusive military control.

3. The "within the jurisdiction of the United States" provision of §1382 does not justify rejecting an exclusive possession requirement.

The United States argues that the phrase "'within the jurisdiction of the United States' simply requires that the military installation in question be subject to federal jurisdiction." U.S. Br. 14. This makes the statutory language meaningless. Obviously, everything in the United States is, by definition, within the jurisdiction of the United States.

Rather, "[w]ithin the jurisdiction of the United States" simply makes §1382 applicable to the incorporated territories and outlying possessions of the United States. As the government points out:

> A question arose, however, whether the statute applied not only to States and incorporated territories, but also the Canal Zone (and, by implication, to other outlying possessions of the United States). In response, Congress amended the statute 'to make it applicable to the outlying possessions of the United States' by adding the phrase 'within the territory or jurisdiction of the United States, including the Canal Zone, Puerto Rico, and the Philippine Islands.'

U.S. Br. 16.

The legislative history of §1382 unambiguously illustrates that Congress intended "jurisdiction of the United States" to denote the political jurisdiction of the United States in a purely territorial sense. The "within" language simply makes §1382 applicable to United States military installations located in, for example, Puerto Rico, but not Germany. As the government concludes:

> The phrase 'within the jurisdiction of the United States' in Section 1382 thus serves, in conjunction with the broad definition of 'United States' in 18 U.S.C. 5, to extend Section 1382 to military installations located, for example in outlying possessions of the United States. At the same time, the phrase 'within the jurisdiction of the United States' also serves a limiting function: It prevents Section 1382 from reaching U.S. military installations in places *not* subject to federal jurisdiction.

Id. at 16.

Yet, in spite of explaining that the "within" language designates the territorial scope §1382, the government intimated throughout its brief that the "within" language encompasses a more expansive meaning that resolves the statutory question presented in this case. *See, e.g., id.* at 14 ("Those statutes, like Section 1382, require the simple presence of federal jurisdiction. They do not require absolute and exclusive ownership of property by the federal government itself.").

There are many meanings of "federal jurisdiction," but, as the legislative history establishes, §1382's jurisdictional element pertains exclusively to federal territorial jurisdiction. Territorial jurisdiction is determined by the area that is controlled by the military and is independent of ownership or interest in specific tracts of land. Thus the phrase "within the jurisdiction of the United States" in §1382 merely "refers to the situs of the geographical areas within which the statute applies rather than to any concept of the particular type of jurisdiction or control which the United States government exercises over said geographical areas." *United States v. Holmes*, 414 F. Supp. 831, 836 (D. Md. 1976). Simply put, Congress added "within the jurisdiction of the United States" to §1382 to ensure that the statute covers the United States territories. That language says nothing about the issue in this case: whether a public road outside of a closed military installation is within the scope of §1382.

4. The common law of civil trespass is not relevant in interpreting §1382 and does not support the government's view of the statute.

The government correctly points out that the crime of reentry onto military installations is distinct from the common law crime of trespass. U.S. Br. 19. The government, nonetheless relies on the common law of civil trespass to support its interpretation of §1382. *See, e.g., id.* at 20. But the common law of trespass is not relevant to the issue presented in this

case: whether "military installation" within §1382 includes a public road on federal land, for which an easement has been granted, and that has been designated as a protest area. More fundamentally, common law trespass principles are inapplicable to §1382 because there is no basis for believing that Congress meant to incorporate them in creating a criminal offense.[11]

Not only is the government's reliance on common law trespass unnecessary, its analysis of the law of trespass is also erroneous. The government asserts that *United States v. McCoy*, 866 F.2d 826 (6th Cir. 1989), holds that mere ownership of land is sufficient to bring an action for civil trespass. U.S. Br. 20. That is incorrect. *McCoy* held that ownership is unnecessary for §1382 to apply where the military actually possesses and operates on lands that it controls; it did not hold that ownership of title is sufficient. Indeed, by ruling that §1382 was limited to unlawful entry past a white line that marked the installation boundary, 866 F.2d at 832, *McCoy* supports the decision below reversing Apel's convictions for peaceful speech that never crossed the green line that marked the installation boundary for Vandenberg. Further, making §1382 coextensive with mere ownership of title is inconsistent with the approach this Court took long

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[11] Whether *Watson* correctly incorporated trespass principles is not at issue. U.S. Br. 19. The government provides no authority in the common law or any other for the proposition that Highway 1 is a "military installation."

ago in *Phisterer* and contravenes Congress's intent to punish only those who enter property supporting military operations and the national defense.

The government contends that "a public roadway easement across a military installation permits protesting only if the easement 'explicit(ly)' grants that right." U.S. Br. 21. In fact, the right to protest on public road easements is well established. "Expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage." *First Unitarian*, 308 F.3d at 1128 (citing *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 686 (1992) (O'Connor, J., concurring)). Use of an easement is not limited to those uses appearing on the face of the easement instrument. Rather, an easement holder has "[the] right to do whatever is reasonably convenient or necessary in order to enjoy fully the purposes for which the easement was granted." Law of Easements & Licenses in Land §8:3 (2013). Given that a public road is a quintessential forum for speech, the right to protest on a public roadway easement is "necessary in order to enjoy fully the purposes for which the easement was granted." Moreover, where the grantor of an easement explicitly condones a specific use of the easement, as Vandenberg has done in designating an area of the Highway 1 easement for protest activity, such use necessarily falls within the scope of the easement. Because protest activity is a use that is within the scope of an easement for a public road, Apel's use of Highway 1 for protesting was not a trespass. At its

most elemental level, "[a] trespass is an invasion of the interest in the *exclusive* possession of land." Restatement (Second) of Torts §821D (2013) (emphasis added). And "exclusive possession" means exclusive occupancy and control. *Id.* at §157 & cmt. a; *see also id.* at §§158, 162. Further, use of an easement within its scope is not an invasion of the easement grantor's interest in the land and thus does not constitute as trespass. *People v. Sweester*, 72 Cal.App.3d 278, 285 (1977) ("[O]ne who uses an easement conveyed for public highway purposes within the scope of the initial grant is not a trespasser against the landowner.").

Nor does the government's reservation of rights in the easement strip Highway 1 of its exclusive civil character, render it subject to military occupation and control, or convert it into a "military installation." *Venetian Casino Resort*, 257 F.3d at 947 ("The mere retention of some property interest in the parcel does not affect the public nature of the dedicated use of the [passageway]."). The easement expressly provides that the County and the State, not the United States, shall be responsible for the Highway. J.A. 36, ¶2. Nothing in the easement contemplates, or even permits, military use or occupation; it provides for exclusive civil use and occupation. The authority to make rules from time to time concerning the public use and occupation of the highway in no way strips the road of its civil character, or renders it a "military installation" for purposes of criminal law. Nothing in the easement, which is signed by the Chief of Army Engineers, vests

power in the installation commander to bar or prosecute civilians for their lawful use of the property.

B. The Military and the United States Have Consistently Interpreted §1382 to Apply Only to Areas Within the Exclusive Possession and Control of the United States.

For at least three decades, the Air Force has consistently interpreted §1382 to require exclusive possession and control. Similarly, the U.S. Attorney's Manual declares that §1382 applies only to a military installation "*over which the United States has exclusive possession*." U.S. Dep't of Justice, *U.S. Attorney's Manual, Title 9, Criminal Resource Manual* §1634 (2010) (emphasis added). This is precisely the test used by the Ninth Circuit in this case and now disavowed by the government.

1. The Air Force has adopted the right of exclusive possession and exercise of actual control test.

The government urges this Court to reject a test the Air Force itself has followed for decades. Not only does the Air Force define "military installation" in terms of military control, it also has explicitly adopted the exclusive possession and control test in defining the scope of §1382.

The Air Force has adopted *Phisterer* and defines "military installation" in terms of operational military

control. The Air Force Judge Advocate General ("JAGAF") has expressly recognized that a military commander's power to exclude and prosecute civilians under §1382 depends on whether the area in question is a "military installation," and that "military installation" means a place where military operations under military command take place. OpJAGAF 1983/20, 22 March 1983 (applying *Phisterer*); *see also* OpJAGAF 1997/25, 14 Feb. 1997 (reaffirming the definition of "military installation" in terms of military control). The JAGAF has thus held: "*Under 18 U.S.C. §1382 it is required that the United States have absolute ownership or an exclusive right to the possession of the property in question.*" OpJAGAF 1983/20.

In considering whether installation commanders can use §1382 to bar individuals from installation property held under a lease, the JAGAF agreed that "the commander may properly exercise this authority if the United States has an exclusive right of possession." OpJAGAF 1997/25. The JAGAF wrote:

> We believe the optimal situation for exercising barment authority under a leaseback plan would combine *both a clear exclusive right of possession and a strong exercise of that right.* The lease agreement should clearly provide for an exclusive right of possession by the United States. *Prudent steps should then be taken to exercise control over this possessory interest. This could include posting signs, limiting access, or building fences. See Flower v United States*, 407 U.S. 197 (1972), *Greer v. Spock*, 424 U.S. 828 (1976), and

> *United States v. Albertini*, 472 U.S. 675 (1985), for discussions regarding exercise of dominion over possessory interests.

Id. (emphases added).

Consistent with this ruling, the JAGAF has long recognized that §1382 applies only to "military installations" that are "under military jurisdiction" – that is, subject to "base entry and internal control procedures for Air Force installations that are under Air Force jurisdiction." OpJAGAF 1984/60, 6 Nov. 1984. For example, the JAGAF recommended three decades ago that installation commanders follow Air Force regulations requiring "the posting of signs and other notice requirements." *Id.* (finding that in order to lawfully conduct a random gate inspection, the commander must have "control" over the base or place where the person or property to be searched is located.). The referenced regulation, AFR 125-37, Security Police/Resources Protection Program, has since been superseded by AFR 31-209, but published regulations at the time expressly required exercise of physical control over the installation, including that "the installation be fenced around the perimeter" and that warning signs be posted at "each entrance to the installation [and] around the perimeter of the installation."

32 C.F.R. §851.17, 851.21(b)(1)-(2) (1978).[12] There are no such signs on Highway 1 where Apel's speech occurred.

In order to be enforceable against civilians, installation regulations were required to be "posted in a conspicuous, appropriate place (for example, at the gates of the installation or at the entrance to the controlled area.") 32 C.F.R. §851.9(a)(4) (1978). Although the specific regulation changed, nothing was altered in terms of the need for the military to identify clearly the perimeter of its closed installation. That does not exist for the area where Apel was protesting on Highway 1.

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[12] The signs were required to read:

WARNING

U.S. AIR FORCE INSTALLATION

IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE INSTALLATION COMMANDER

(SEC. 21 INTERNAL SECURITY ACT OF 1950; 50 U.S.C. 797)

WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH

Id. at §851.19(a)(1).

2. Military and Air Force regulations require installation commanders to control entry into military installations under their command; they do not authorize control over public roads outside the installation perimeter.

Military regulations governing installation security require commanders to control access to the installations within their command. The regulations are clear that this is authority to create a controlled perimeter and control what occurs within the installation; it does not include the public roads outside of the closed installation.

Department of Defense ["DoD"] Directive 5200.8-R, entitled "Physical Security Program," establishes mandatory minimum standards for protecting DoD personnel, installations, operations, facilities, and related resources. DoD Directive 5200.8-R §§C1.1, C1.2.1, C1.2.2. Specifically, it implements minimum standards "for controlling entry onto and exiting from military installations and the facilities within military installations." *Id.* §C3.1. It requires procedures to control access to installations, including "[e]nforcing the removal of, or denying access to, persons who threaten security, order and the discipline of the installation." *Id.* §C3.2.5. These physical entrance controls are required at the *perimeter of the installation*. DoD Directive-Type Memorandum (DTM) 09-012, Attachment 3, Physical Security Access Standards, Access Control (Dec. 8, 2009) (emphasis

added). "Physical access control" means "[t]he process of *physically controlling personnel and vehicular entry to installations*, facilities, and resources." *Id.* at Glossary, Part II, Definitions (emphasis added).

Air Force regulations mandating procedures for physical security at Air Force installations further illustrate that the military considers an "installation" to be exclusively controlled military property marked by perimeter gates and entry check-points. Such regulations mandate uniform security procedures, including access to installations and protection of personnel and property under military command. AFR 207-4, §1-1 (June 28, 1991). The regulations mandate that "[e]ach installation must clearly define the access control measures . . . required to safeguard the installation and ensure accomplishment of its mission." AFR 207-4, §2-1. Installation commanders are thus *required* to "control installation access," "[d]etermine the degree of control required over personnel and equipment entering or leaving the installation," prescribe procedures for the "search of persons (and their possessions) on the installation" including "searches conducted as persons enter the installation, while they are on the installation, and as they leave the installation," and "[e]nforce the removal of, or deny access to, persons who threaten order, security, or discipline of the installation." *Id.* §2-2(a)-(c); §§2-3, 1-4(c)(1)(a)-(c).

These regulations demonstrate that the power to exclude is defined by the power to control access to the installation. Installation commanders are authorized, indeed required, to control access to their installations,

and the power to exclude civilians is coextensive with the power to control installation access. Nothing in the regulations grants commanders the power to exclude persons from government property generally; rather, they confer power to control entry into military installations under exclusive military control. No regulation grants the commanders the power to exclude civilians from public highways outside installation entry points. By failing to control access to Highway 1 and, instead, placing the installation entry point several hundred feet away, the Air Force has demonstrated that it does not consider Highway 1 to be a "military installation" under exclusive military control.

Furthermore, the immediate predecessors to the governing regulations make clear that the Air Force never interpreted §1382 to empower installation commanders to exclude peaceful protestors outside installation check points. Air Force regulations expressly distinguished between military and civil responsibility and authority. While installation commanders are responsible for their installations and authorized to exclude civilians from within them, "[l]ocal civilian authorities are primarily responsible for maintaining order outside the perimeter of an installation." 32 C.F.R. §809a.2 (1979), *accord* 32 C.F.R. §809a.2 (1999). Absent "an emergency invo.v[ing] imminent danger to personnel or property under the commander's jurisdiction," installation commanders are authorized to employ Air Force resources outside the perimeter only if "essential" and only if United States Air Force headquarters approved it. *Id.*

Air Force regulations expressly provided that "[p]eaceful protestors outside perimeter of installation without interference to USAF mission," should be "[i]gnore[d]." AFR 31-209, Attachment 3 (Dec. 1, 1998). Where "[d]emonstrators interfere with base operations to a minor degree, by obstructing traffic moving on- and off-base," commanders should use "alternate means of access," ask civil authorities for assistance, if necessary, and provide USAF assistance only upon DoD approval. *Id.*

Thus, the Air Force's own regulations and policies have consistently defined "military installation" in terms of a requirement for exclusive possession and control.

C. Traditional Principles of Statutory Construction Warrant Interpreting §1382 to Require Exclusive Possession and Control.

The government proposes no limit whatsoever on the scope and meaning of §1382, arguing that "military installation" refers to all of the land owned by the federal government. Apel, by contrast, argues that military installation refers to the closed base delineated by the green line drawn by the government. Under traditional principles of statutory construction any ambiguity arising from Congress's failure to define "military installation" must be construed narrowly in favor of Apel and against the military.

1. Principles of constitutional avoidance counsel against interpreting §1382 to apply to a public road on which an easement has been granted and that has been designated as a protest zone.

This Court long has stressed the canon of constitutional avoidance as an interpretive tool, counseling that ambiguous statutory language must be construed to avoid serious constitutional doubts. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."). Likewise, this Court has rejected an agency's interpretation of its statute when that would raise serious constitutional doubts. *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001).

Interpreting §1382 to apply to public roads outside a closed military base over which an easement has been granted and that has been designated as a protest zone would raise serious constitutional concerns. Part I of this brief argues that the government's interpretation of §1382 and the conviction of Apel violate the First Amendment. Even if this Court does not reach that question, it is clear that the government's interpretation of the statute raises serious

constitutional issues. A base commander would have unfettered discretion to issue a bar letter that cannot be appealed except to the base commander, to indefinitely exclude the barred person for any reason, including the content of his or her speech, from a public road that has been designated a protest zone outside of the closed base. The person then could be criminally convicted solely for not following an order to leave.

This interpretation of the statute is inconsistent with basic principles of freedom of speech long ago adopted by this Court. For example, this Court has said that the government may condition speech in a public forum on government approval – which is exactly what the government's interpretation of §1382 would mean for Apel – only if the government has an important reason for the restriction and only if there are clear criteria leaving almost no discretion to the government authority. *Saia v. New York*, 34 U.S. 558, 559-60 (1948) (declaring unconstitutional a permit requirement for trucks with sound amplification equipment where government officials had unfettered discretion in deciding whether to issue the permits). As this Court explained, the government "cannot vest restraining control over the right to speak . . . in an administrative official where there are no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951); *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 (1988) ("[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.").

In addition, this Court repeatedly has held that if the government is going to require permission for a person to speak, there must be procedural safeguards, such as a requirement for prompt determinations as to requests and judicial review of denials. *See, e.g.*, *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (describing the procedures which must be followed when a permit is required for speech).

Under the government's interpretation of §1382, there is no limit on the base commander's discretion and there are no procedural safeguards. The base commander can exclude just those who are engaged in speech or even just those whose message is disliked. Because this interpretation of §1382 raises obvious constitutional doubts, the statute should be interpreted to avoid them and not to apply to peaceful protests on a public road outside of a closed military base over which an easement has been granted and that has been declared a protest zone.

2. The rule of lenity counsels against interpreting §1382 to apply to a public road on which an easement has been granted and which has been designated as a protest zone.

Apel has been convicted for violating a criminal statute, 18 U.S.C. §1382. This Court long has held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *see also Ladner v. United States*, 358 U.S. 169, 177 (1958). As

this Court explained, "[i]n various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (internal quotation marks and citations omitted). Thus, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* at 348.

The government surely cannot claim that there is no ambiguity as to whether a public road outside of a closed military base is within the scope of §1382. For decades, virtually every court and military agency has held that §1382 applies only if the United States has exclusive possession and control. The United States urges a different interpretation, arguing that "military installation" includes all land owned by the government, even when an easement has been granted. The rule of lenity requires that the Court interpret the statute in "favor of the defendant," exactly as the Ninth Circuit did in this case.

D. Interpreting §1382 to Require Exclusive Possession and Control and Not to Apply to Public Roads Where an Easement Has Been Granted Is Very Unlikely to Pose Any Threat to National Security.

The government argues that an exclusive possession limitation on §1382 would "threaten substantial

harm to the safe and orderly operation of many of this Nation's military installations." U.S. Br. 22. Since *United States v. Watson* in 1948, many courts have interpreted §1382 in accord with the exclusive possession requirement (*see* cases at note 7, *supra*), but the government does not point to a single example where this interpretation has threatened national security, nor does it explain why other statutes are insufficient to deal with any problem. There is every reason to believe that the government already has defined the perimeters of bases, including where it puts guard gates and where it draws green lines, with the established interpretation of §1382 clearly in mind.

Expanding §1382 to apply to areas outside the military's exclusive possession is unnecessary to protect national security. First, there is no basis for believing that public roads outside of a closed military installation are sensitive areas where national security is at stake. The secretary of a military department, such as the Secretary of the Air Force, may grant public roadway easements across military reservations only if such an easement would not be "against the public interest." 10 U.S.C. §§2668, 2669. If Highway 1 were to traverse a sensitive area of Vandenberg, national security concerns would require the Secretary of the Air Force to deny the easement.

The section of Highway 1 traversing federal property at Vandenberg is open to the public twenty-four hours a day, seven days a week. Unlike the road in *Greer* that was regularly patrolled by military personnel, and on which vehicles were stopped and

searched, *see Greer*, 424 U.S. at 830, this stretch of Highway 1 is a completely open road. Apel, and others who are subject to barment orders, may travel along this popular stretch of road unmonitored. Indeed, Apel was allowed to be on Highway 1 for any purpose other than exercising his First Amendment right to protest. J.A. 64, ¶2 (bar order allowing Apel to be on the roads on Vandenberg property for travel purposes).

Moreover, individuals who have been convicted of, and released from prison after serving time for murder, assault, rape, armed robbery, theft, felony destruction of property, or narcotics trafficking are not only allowed to drive, ride a bike and walk, on Highway 1, but may also participate in protest activities on Highway 1. People who have been barred from other military bases or facilities, but are not under a barment order from Vandenberg are allowed to freely traverse Highway 1 and participate in protests there. There is no limit on what can be brought onto this stretch of Highway 1: persons, cars, and trucks with dangerous cargo are allowed, as they are on all other public roads. Seemingly, the magnitude and variance of individuals traveling along Highway 1 unmonitored by Vandenberg personnel would pose a substantial security concern if this stretch of Highway 1 were the site of sensitive operations.

The government contends that the installation commander must be empowered to exclude civilians from Highway 1 because §1382 is the military's first line of defense. But all of the operational areas of

Vandenberg are set apart from Highway 1. All entrances to the base proper, and the operational areas of the base, are patrolled and controlled by Vandenberg personnel. The protest area is in front of a green line that designates where the exclusive jurisdiction of Vandenberg begins. J.A. 79, 91. The main gate of Vandenberg, which is guarded by armed personnel, is 200 yards away from the protest area. J.A. 78-79. Protesters and other members of the public can enter the closed installation only through this armed and patrolled gate on the other side of the green line. J.A. 78-79. Protesters are not allowed to cross the green line and into the exclusive jurisdiction of Vandenberg. Even if a protester crossed the green line, he or she would undoubtedly be stopped at the armed gate 200 yards from the protest area. Additionally, during scheduled protests, Vandenberg security officers are sent to the protest area to monitor the activity. J.A 111-112.

In fact, Vandenberg tolerates many public uses even behind the green line, including an Amtrak station and a public school. J.A. 64. Vandenberg thus has two lines of defense: the controlled access entry gate and the green line marking the outer boundary of its exclusive jurisdiction. There is no justification for extending the base commander's power beyond the green line and on to public roads outside of exclusive military control.

Furthermore, §1382 is a Class B misdemeanor, the lowest level of a federal misdemeanor offense. It is unlikely that a Class B misdemeanor is an essential

safeguard for protecting national security. A Class B misdemeanor, also known as a petty offense, is punishable by no more than six months in prison or a fine of $5,000, or both. 18 U.S.C. §§19, 3571, 3581. By contrast, 18 U.S.C. §1384, which prohibits prostitution near a military base is a Class A misdemeanor.[13] In fact, the majority of the statutes designed to protect military property and security are either Class A misdemeanors or felonies under federal law. *See* U.S. Br. 23 n.3. There is an obvious tension between the government saying that its interpretation of §1382 is essential for national security and the reality that the statute creates only a Class B misdemeanor.

Finally, it is unnecessary to rely on §1382 to protect national security. The Vandenberg base commander can use many other federal and state statutes to protect the national security interests of the base, if necessary, without infringing on the First Amendment rights of peaceful protestors at Vandenberg. Section 2155 of Title 18, for example, is a broadly written statute that punishes any person who with the "intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities." 18 U.S.C. §2155. Section 2155 has

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[13] A Class A misdemeanor is punishable by no more than a year in prison or a fine of $100,000, or both. 18 U.S.C. §§3571, 3581.

been used to punish persons who entered onto military bases and damaged military property. *United States v. Platte*, 401 F.3d 1176 (10th Cir. 2005) (upholding a conviction where protestors trespassed on a military reservation and removed a small portion of a fence). There are many other federal statutes to protect the security of military bases. *See, e.g.*, 50 U.S.C. §797 (violation of defense property security regulation); 18 U.S.C. §§795, 797 (offenses related to photographing defense installations); 18 U.S.C. §1381 (enticing desertion from the Armed Forces); 18 U.S.C. §1361 (damaging government property); 18 U.S.C. §1389 (hate crimes against service members, their immediate families and their property); 18 U.S.C. §1362 (damaging government communication lines); 18 U.S.C. §§2387, 2388 (advising mutiny and other subversive activities); 18 U.S.C. §81 (arson of military or naval stores).

The government says that base commanders will be forced to choose between ensuring security and granting easements if they cannot bar individuals from protesting on public roads outside of closed military bases. U.S. Br. 26. This seems highly unlikely given all of the other statutes that can be used to protect security. But if a base commander believes that it is necessary to close a road in order to protect national security, the commander has the authority and indeed the duty to do so. The State and County then would need to reroute the road. The United States decides where to draw the green boundary line, and there is every reason to believe that at Vandenberg

the line already has been drawn to ensure the protection of the base and its activities.

Under the Assimilative Crimes Act (ACA), state criminal laws also apply to federal enclaves as gap fillers and can be used to prosecute criminal activity that occurs on Highway 1.[14] Courts have concluded that Vandenberg is a federal enclave for purposes of the ACA. *See, e.g., Taylor v. Lockheed Martin Corp.*, 78 Cal.App.4th 472, 479-80, 92 Cal.Rptr.2d 873, 877-78 (2000). State criminal laws are applicable to criminal conduct occurring in any area of a federal enclave, regardless of whether the United States retains exclusive or concurrent jurisdiction. *See United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982) (holding that state DUI law applied to a public highway

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[14] The ACA, codified as 18 U.S.C. §13, transforms a crime against the state into a crime against the federal government when it occurs on a federal enclave. *United States v. Press Publishing Co.*, 219 U.S. 1, 31 (1911). Federal enclaves are lands within the "special maritime and territorial jurisdiction of the United States," a term which includes "(a)ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof. . . ." *See* 18 U.S.C. §7(3). In enacting the ACA, Congress sought to establish a gap-filling criminal code for federal enclaves. *Lewis v. United States*, 523 U.S. 155, 164 (1998). Specifically, a state criminal offense which violates state law, but is not otherwise punishable under federal law, becomes a federal offense when committed on a federal enclave within the state. 18 U.S.C. §13. Where, however, both federal and state statutes cover the same subject matter, the state law is inapplicable. *See* 18 U.S.C. §13(a) (prohibiting assimilation of state law when the conduct in question has been "made punishable by any enactment of Congress.").

running through a naval shipyard that was a federal enclave).

It is unsurprising that the government's own witness at trial, Sergeant Cox, testified that Apel and the protesters did not pose a security risk to Vandenberg Air Force Base. J.A. 103, 107. Under the terms of the bar order, Apel was allowed on to Highway 1, but not for peaceful protest activities. This result undermines the government's claim with regard to national security and makes clear that the government's purpose was to restrict Apel's speech.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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No. 12-1038

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DENNIS APEL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The court of appeals held that 18 U.S.C. 1382 is unenforceable on a public highway easement across Vandenberg Air Force Base because "the federal government lacks the exclusive right of possession of [such an] area." Pet. App. 2a. In opposing certiorari, respondent defended that position, urging that, although such an "exclusive-possession requirement * * * does not appear in [Section 1382]" and the statute "makes no mention of control or its exercise by the government," the court of appeals nonetheless correctly "read extra-statutory requirements into [Section] 1382, including the exclusive-possession requirement." Br. in Opp. 17.

Respondent has now abandoned that position, arguing instead that the key question is whether he was in fact found within a "military * * * reservation, post, fort, arsenal, yard, station, or installation." 18 U.S.C. 1382. That question, he says, would have different answers at different places within Vandenberg, because it

requires an inquiry into the "actual character of the place," Resp. Br. 29, that depends on matters such as whether "the government uses [the particular place] for military purposes," *id.* at 7, whether the place is in "an enclosed area," *id.* at 31, and whether the military has "physical control and dominion" and the "right of exclusive possession," *id.* at 34.

That atextual and unworkable position fares no better than the position of the Ninth Circuit. And respondent's First Amendment argument—whether framed as a constitutional attack on his conviction (that was not addressed below) or as a constitutional-avoidance basis for construing Section 1382—fails because the statute is a content-neutral proscription against entry into a military installation by a person who was barred for committing unprotected acts of trespassing and vandalism. The correct reading of Section 1382 is that a person commits a misdemeanor if he reenters a place subject to military command within the jurisdiction of the United States after receiving a valid order barring him from that place. Because that describes respondent's conduct, the Ninth Circuit's contrary judgment should be reversed.

A. Respondent Offers No Persuasive Reason To Reject The Government's Straightforward Reading Of Section 1382

1. Congress has made it a misdemeanor for a person to "reenter[] or [be] found within" a "military * * * reservation, post, fort, arsenal, yard, station, or installation" that is "within the jurisdiction of the United States," if that person has been barred from that place. 18 U.S.C. 1382. As the government previously explained (Br. 10-16), the elements of that offense are straightforward: "[R]eenter[ing]" or being "found within" a place simply defines the defendant's criminal conduct. The term "military * * * reservation, post, fort, arsenal,

yard, station, or installation"—or for convenience, just "military * * * installation"—refers to any place subject to military command. And "within the jurisdiction of the United States" encompasses military installations anywhere within federal jurisdiction, including in States, incorporated territories, and the outlying possessions of the United States.[1]

The statute requires no more. In particular, it does not require the showing demanded by the Ninth Circuit, that the United States have exclusive possession of the property on which the person was found. See U.S. Br. 17-22. Nor would such a limitation reflect sound policy. Base commanders rely on Section 1382 to maintain the safety and integrity of their personnel and facilities. That interest is undiminished by the presence of a highway easement across a military installation. The misdemeanor sanctions in Section 1382 are effective both in deterring repeat harmful conduct in the first instance, and in supplying arrest authority to preempt the threat posed by the return of an individual already identified as a risk to base personnel and operations.

2. Respondent does not dispute many aspects of the government's interpretation of Section 1382. First, although respondent previously argued that "the government's interpretation of 'within the jurisdiction of the United States' is not even plausible" (Br. in Opp. 14), he now relies heavily on the government's explanation of

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[1] Respondent mischaracterizes the government's position as a claim "that §1382 applies * * * solely because the United States owns the land." Resp. Br. 22. The government has never suggested such a test. Federal ownership is neither necessary (Section 1382 would protect a facility leased by the military) nor sufficient (Section 1382 is inoperative on federal lands not under military command).

that phrase in agreeing that "[t]hat language says nothing about the issue in this case" (Resp. Br. 38-40 (citing U.S. Br. 16)).

Second, although respondent previously endorsed an analysis grounded on "an element of the law of trespass" (Br. in Opp. 14 (citation omitted)), he now agrees with the government that "[t]he common law of civil trespass is not relevant in interpreting [Section] 1382" (Resp. Br. 40).[2]

Third, although respondent previously urged this Court to "read extra-statutory requirements into [Section] 1382, including the exclusive-possession requirement" (Br. in Opp. 17), he now contends that this requirement "derives directly from the text of [Section] 1382," and turns on "what constitutes a 'military installation'" (Resp. Br. 23). Thus, no party to this case would have the Court engraft extratextual requirements onto Section 1382. See U.S. Br. 17-19.

Finally, the essential facts of the case remain undisputed. Respondent has not withdrawn his concession (Br. in Opp. 2, 4, 7, 13) that after receiving a valid barment order, he was found within the defined boundaries of Vandenberg Air Force Base, and that that place is within the jurisdiction of the United States.

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[2] Respondent nonetheless proceeds to analyze the case under trespass principles. Resp. Br. 41-43. But he is mistaken in claiming that the grant of a highway easement by the United States impliedly carries an unconditional right of public protest within the easement. Respondent cites no authority from any jurisdiction construing any highway easement that way (and such an interpretation would surely come as quite a surprise to the holders of many servient estates, see U.S. Br. 20-21). And the United States in particular cannot surrender rights in property (such as an implied right to protest) by mere implication. See *United States* v. *California*, 332 U.S. 19, 39-40 (1947).

3. Respondent and his amici instead challenge the government's interpretation of Section 1382 by asserting, first, that "the government has not contravened [the existence of an exclusive-possession requirement] since the 1970s." NACDL Amicus Br. 37; see Resp. Br. 44-51. That is incorrect. The United States has here and elsewhere resisted that requirement, and numerous courts have rejected that requirement. See Pet. 13-14 (discussing *United States* v. *Ventura-Meléndez*, 275 F.3d 9, 17 (1st Cir. 2001); *United States* v. *LaValley*, 957 F.2d 1309, 1313 (6th Cir.), cert. denied, 506 U.S. 972 (1992); *United States* v. *Allen*, 924 F.2d 29, 31 (2d Cir. 1991) (per curiam); *United States* v. *McCoy*, 866 F.2d 826, 830 n.4 (6th Cir. 1989)).

In any event, the Executive Branch's acquiescence in an incorrect interpretation of a criminal statute could not change the meaning of that statute. That is a matter for judicial resolution. Certainly, some materials prepared by the Executive Branch—including the *United States Attorney's Manual* (see U.S. Br. 11 n.1) and some Air Force materials (see Resp. Br. 44-47)—state or imply that Section 1382 may not apply where the government lacks exclusive possession. But those materials offer no analysis and may reflect overly cautious legal advice, a nationwide least-common-denominator rule, or simple error. Most fundamentally, those materials are not "administrative interpretation[s] that [are] entitled to deference" because "[t]he law in question, a criminal statute, is not administered by any agency but by the courts," and this Court "ha[s] never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment).

4. Respondent's central statutory argument is that the term "military * * * installation" does not include all places subject to military command. As explained below, pp. 11-18, *infra*, respondent's ambiguous interpretation of that term produces significant problems. But more importantly, he offers no sound reason to doubt the government's reading of that term.

a. By enumerating a variety of military facilities, "Congress sought to invoke the words' common core of meaning." *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (internal quotation marks and citation omitted). As explained in the government's opening brief, the words "military * * * reservation, post, fort, arsenal, yard, station, or installation" share the salient characteristic of being under military command. See U.S. Br. 12-14.

Respondent correctly invokes that principle (see Br. 23), but uses it to shrink the statute's reach to such places that are "nonpublic" (*id.* at 27) or in the military's "exclusive" possession (*id.* at 29) or "enclosed" (*id.* at 31). But nothing in common usage requires that a "post" be inaccessible to the public, that an "installation" be enclosed by a fence, or that a "reservation" be dedicated to one exclusive possessory interest at all times and for all purposes. And no other feature of the statute suggests that Congress intended an implicit "exclusive possession" limit on the broad language it used. Rather, the terms "reservation, post, fort, arsenal, yard, station, or installation" indicate that Congress meant to be comprehensive. That is confirmed by the breadth of the statute's purpose (see U.S. Br. 22-26) and the broad definitions of "military installation" elsewhere in federal law. See, *e.g.*, 10 U.S.C. 2801(c)(4) ("'[M]ilitary installation' means a base, camp, post, station, yard, center, or other

activity under the jurisdiction of the [Department of Defense]."); see also U.S. Br. 13. And this Court's interpretation of "military post" or "military station" in *United States* v. *Phisterer*, 94 U.S. 219 (1877), comes to the same thing. A place under military command is, to use *Phisterer*'s phrase, a place "where something * * * more or less closely connected with arms or war is kept or is to be done," *id.* at 222. Vandenberg Air Force Base is certainly such a place.[3]

Congress described the places protected by Section 1382 without qualifications as to public accessibility, types of possessory interests, or anything else. See *United States* v. *Albertini*, 472 U.S. 675, 682 (1985) ("The language of the statute does not limit § 1382 to military bases where access is restricted."). Indeed, to express his construction, respondent attaches adjectives and modifying phrases to the statutory terms. See, *e.g.*, Resp. Br. 29 ("*closed* military installation") (emphasis added); *id.* at 33 ("military installations *in the exclusive possession* and control of the military") (emphasis added); *id.* at 35 ("*controlled* post") (emphasis added). "[T]he short answer" to respondent's construction "is that Congress did not write the statute that way." *Corley* v. *United States*, 556 U.S. 303, 315 (2009) (citation omitted).

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[3] Some of the statutory terms—"installation," as respondent points out (Br. 48-51)—are sometimes used elsewhere as terms of art to refer to a particular type of facility operated by a particular branch of the Armed Forces and secured in a particular way. But as the definition of "military installation" quoted in the text shows, such specialized usage is hardly universal. And the specialized usage of one term by one branch is unhelpful in construing the many terms of a statute that protects all branches across a range of contexts.

b. Respondent also claims that "[t]he area of the [Highway 1] easement cannot be considered part of [Vandenberg's] commander's area of command." Resp. Br. 36 (internal quotation marks omitted). That is untenable.

The place where respondent was found was under military command, as a matter of law. The land on which respondent was found is owned by the United States and administered by the Secretary of the Air Force. The Secretary defines Vandenberg Air Force Base to include the place where respondent was found. The commander of the 30th Space Wing, who issued respondent's barment order, is designated as Vandenberg's commander. Those legal authorities are what "vests power in the installation commander" (Resp. Br. 43-44).[4]

The highway easement does not change that result. The easement was granted by the Secretary of the Air Force, and it is limited to "a right-of-way for a road or street over * * * lands of the United States." J.A. 35 (emphasis omitted). It grants no other rights, and as

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[4] Until his merits brief in this Court, respondent never contested (and indeed conceded, see C.A. E.R. 162) the nature of Vandenberg's commander's authority. For that reason, the materials documenting that authority are not in the record. Upon request, the government will lodge with the Clerk the relevant public records. See Sup. Ct. R. 32.3. In particular, the place where respondent was found lies within the historical Rancho Jesus Maria, which the United States acquired in fee, subject to certain easements and reservations, by deed on September 30, 1941, and placed under the administration of the Department of the Army as part of the newly established Camp Cooke. On June 7, 1957, that portion of Camp Cooke was renamed Cooke Air Force Base, and on June 21, 1957, it was transferred to the Department of the Air Force. Effective October 4, 1958, it was renamed Vandenberg Air Force Base.

previously explained (U.S. Br. 3, 21), the easement has several features that *confirm*, not dissipate, the authority of Vandenberg's commander: Road repairs are performed "under the general supervision and subject to [the commander's] approval." The "use and occupation" of the easement is "subject to such rules and regulations as the [commander] may prescribe." And the United States retains its own "rights-of-way for all purposes across, over, and/or under" the easement. J.A. 35-36. Respondent does not address those provisions. Instead, he asserts that highway easements bestow an "exclusive civil character" on a strip of roadway. Resp. Br. 43. But none of the cases he cites (see *id.* at 36, 43) concerns a highway easement, which merely permits traffic to pass.

Consistent with the terms of the easement, Vandenberg's commander has issued an order closing the base, but he has expressly permitted use of the roadway easements "limited to roadway maintenance and vehicular travel activity through the base," "subject to any rules and regulations [he] may prescribe." J.A. 51. Vandenberg's security forces in fact patrol areas in the easement. Pet. App. 14a-15a. And respondent makes no effort to reconcile his claims that Vandenberg's commander (1) lacks all authority over the easement, but (2) nonetheless had authority to designate a protest area within that easement (see J.A. 45-50) in the litigation settlement on which respondent so heavily relies. The answer, of course, is that the commander *does* have command authority in that area.

5. Finally, respondent and his amici object that the government's interpretation of Section 1382 gives military commanders too much authority over the areas under their command. See, *e.g.*, Resp. Br. 33-38, 55-62. But this Court has recognized that a "necessary concom-

itant of the basic function of a military installation has been 'the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command.'" *Greer* v. *Spock*, 424 U.S. 828, 838 (1976) (brackets in original) (quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961)). And Section 1382 itself has ample safeguards and limitations.

Some of respondent's amici assert that applying Section 1382 outside of enclosed areas threatens the "prosecution of civilians who lack notice that Section 1382 applies." NACDL Amicus Br. 20. That is incorrect. A conviction under the illegal reentry provision of Section 1382 requires proof that the defendant knew he was within a "military * * * installation." Cf. Model Penal Code § 221.2 cmt. 2(a), at 88 (1980) (noting that the "knowledge requirement" in criminal trespass law is "designed primarily to exclude from criminal liability * * * the inadvertent trespasser"). Fencing or signage can provide such notice, but so too can oral warnings from a base's security forces. See, *e.g.*, *United States* v. *Ventura-Melendez*, 321 F.3d 230, 231-232 (1st Cir. 2003) (recounting warnings given to defendants by Coast Guard personnel). And receipt of a barment order is itself a form of prior notice.

As for concerns about underlying barment orders (*e.g.*, Resp. Br. 52-54), abundant procedural and substantive safeguards exist. Only commanders may issue barment orders; that authority is nondelegable. Reasonable grounds must exist for debarment and for the length of the debarment period. The barment order must respect other laws (such as an eligible individual's right to obtain on-base medical treatment). And the recipient of a barment order may ask at any time that it be lifted. See Dep't of Def. Instruction 5200.08 § 3.2.3 (2010); *The*

Military Commander and the Law 238-239 (Holly M. Stone et al. eds., 11th ed. 2012). A barment order must be consistent with the First Amendment. See *Albertini*, 472 U.S. at 685-686 (explaining that the barment order in *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam), was invalid because it had issued based on "activity * * * protected by the First Amendment"). And barment orders are subject to judicial review as final agency action under the Administrative Procedure Act, 5 U.S.C. 551, *et seq.* See U.S. Reply Br. at 5, *Albertini*, *supra* (No. 83-1624) (citing *Lewis* v. *United States*, 445 U.S. 55, 64, 67 (1980)).

In any case, concerns about barment orders cannot be a basis for construing "military * * * installation" because that term sets the scope of both paragraphs of Section 1382. Only the second paragraph concerns barment orders. The first paragraph prohibits "go[ing] upon any military * * * installation, for any purpose prohibited by law or lawful regulation." 18 U.S.C. 1382. That provision has nothing to do with barment orders.

B. Respondent's Alternative Reading Of Section 1382 Is Novel, Ambiguous, Incorrect, And Unworkable

In respondent's view, the term "military * * * installation" is narrow, but the particulars of his approach are unclear. At various points in his brief, he describes Section 1382's application as turning on whether the place of the violation was: "use[d] for military purposes" (Resp. Br. 7); "nonpublic" (*id.* at 27); "set apart for specialized occupation and use" (*ibid.*); under the military's "exclusive possession" (*id.* at 29); "dedicated to military purposes" (*id.* at 30); "where military functions are performed" (*id.* at 31); "an enclosed area" (*id.* at 31); under the military's "physical control and dominion" (*id.* at 34); or "within the confines of a controlled post" (*id.* at 35).

Those imprecise and varying formulations cannot be reconciled with Section 1382's text and purpose: that the statute protects all places subject to military command. See pp. 6-7, *supra*. But even on its own terms, respondent's attempt to define "military * * * installation" is flawed. Although this Court left open in *Albertini* the question how precisely to define "military * * * installation," see 472 U.S. at 684, no court of appeals before or since has thought it sound to administer Section 1382 through anything like the multi-factor approach respondent proposes.

1. Respondent's approach is ambiguous. The myriad descriptors he offers are not synonyms, and some subset might be true of any given place at any given time. But respondent does not explain how the factors operate together, whether all or some are necessary, or whether additional unnamed factors exist.

Even the individual factors are ambiguous. On the question of "control," for example, contrary to respondent's assertion that the military cannot "control public access to the easement on Highway 1" (Br. 37), the military can (and just a few months ago did) close the highway for security reasons.[5] On the question of "military functions," contrary to respondent's suggestion that Highway 1 is a "public road[] where no military functions are performed" (Resp. Br. 31), the State of California recognizes that part of the route along Highway 1 "is designated for shipment of hazardous materials including * * * rocket propellants for Vandenberg Air Force

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[5] See *Hwy. 1 Closed near VAFB Main Gate*, Lompoc Record (May 24, 2013) ("Highway 1 is closed near Vandenberg Air Force Base tonight while military authorities investigate a stolen van at the main gate, base officials said."), http://www.lompocrecord.com.

Base."[6] Respondent offers no answer to whether that exercise of control or use for military transportation is sufficient to invoke Section 1382's coverage, either temporarily or permanently.

2. In addition, respondent's approach cannot be correct because it would withdraw Section 1382's coverage from numerous places that Congress and this Court have plainly understood are "military * * * installation[s]." Such unsound results would, for the most part, flow from respondent's insistence that Section 1382 protects only "nonpublic" or "closed" parts of a military installation.

When Congress adopted Section 1382's predecessor (Criminal Code, ch. 321, § 45, 35 Stat. 1097), military regulations envisioned a level of openness that would seem to defeat Section 1382's application under respondent's approach. Even at "posts at which are located lake or coast defenses"—the most sensitive military installations—"American citizens whose loyalty to their Government [was] unquestioned" were "permitted to visit such portions of the defenses as the commanding officer deem[ed] proper." Regulations for the Army of the U.S., Art. XXXVIII, para. 355 (1908). As the government noted in *Albertini* in 1985, "some installations are routinely open to members of the public; others are open on specific occasions or for certain purposes," such as the open house in *Albertini* itself; and others are "not open to the public, [such that] individuals seeking to enter are screened, and they can enter only with specific authorization." U.S. Br. at 13, *Albertini*, *supra* (No. 83-1624). That is still true today. Yet nothing suggests that Con-

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[6] See Cal. Dep't of Transp., *Transportation Concept Report: State Route 246 in Santa Barbara County* 15 (May 2004), http://www.dot.ca.gov/dist05/planning/sys_plan_docs/tcr_factsheet_combo/sb_sr246_tcrfs.pdf.

gress intended Section 1382 to apply only to an undefined subset of those military installations.[7]

Respondent's approach is also incompatible with this Court's application of Section 1382 to Fort Dix in *Greer*, *supra*. Respondent rationalizes the application of Section 1382 in *Greer*, stating that "[t]he activity there took place *within* the confines of a gated military reservation and thus on property occupied, controlled and used by the military for military purposes." Br. 37. But respondent's approach would seem to exclude places within Fort Dix at issue in *Greer*. As the government explained in its brief in *Greer*:

> There are seven main entrances to Fort Dix; there are no guard houses at the entrance gates and guards are not normally posted. * * * The State of New Jersey retains rights of way over four county roads and the state highway that pass through Fort Dix. * * * Civilians who are not dependents of military personnel are * * * permitted to visit nonrestricted areas of the base. A large sign at the entrance to Fort Dix on the state road that crosses the base states "Visitors Welcome."

U.S. Br. at 9-13, *Greer*, *supra* (No. 74-848); see *Greer*, 424 U.S. at 830; *id.* at 851 (Brennan, J., dissenting).[8]

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[7] Myriad provisions of federal law likewise state or assume that parts of military installations will be accessible to the public or not used exclusively for military purposes. See, *e.g.*, 10 U.S.C. 973(c) (membership on board of a school on a military reservation), 2671 (public hunting licenses on military reservations), 4772 (National Museum of the United States Army), 4777 (permitting the landing of ferries, building of bridges, and driving of livestock on Army reservations), 9778 (YMCA buildings on Air Force reservations).

[8] An exhibit in the record in *Greer* (reproduced here at App., *infra*, 1a) depicts two of the plaintiffs distributing pamphlets on a

3. Respondent's approach would also be unworkable in practice. Military security forces would face a significant challenge in conforming to the patchwork coverage of Section 1382 that respondent's approach would generate. Military bases often have roads and facilities regularly or occasionally accessible to the public that Section 1382 might or might not cover on respondent's approach. For example, at some bases, certain areas are opened for hunting, fishing, and recreation, or closed for military use, on a day-by-day basis. See, *e.g.*, *Jackson Guard Daily Access Map*, http://jg.eglinforcesupport.com (last visited Nov. 19, 2013) (link to map of upcoming day's closures at Eglin Air Force Base). Other installations house military academies. Still other military installations welcome visitors to museums with limited hours. On respondent's approach, it is entirely unclear whether coverage comes and goes day by day, or whether some military bases could acquire a permanent "civil character" (Resp. Br. 43) that would oust Section 1382's application at all times. At a minimum, boundaries between covered and non-covered times and places would be poorly defined and difficult to administer.

Nor would respondent's approach be workable for courts. Under his approach, many prosecutions under Section 1382 could entail an ad hoc multi-factor trial on whether the defendant had crossed some nebulous threshold of the military installation. Nothing suggests Congress intended such a burdensome and uncertain undertaking. Cf. *Benson* v. *United States*, 146 U.S. 325, 331 (1892) (explaining that when a "tract ha[s] been

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sidewalk inside Fort Dix just prior to their arrest. That scene does not fit respondent's description (Br. 27, 31, 35) of a "nonpublic" area "within the confines of a controlled post" "set apart for specialized occupation and use."

legally reserved for military purposes," "courts follow the action of the political department of the government" and will not "inquire what may be the actual uses to which any portion of the reserve is temporarily put"). The government's approach is judicially administrable because it depends on a clear line—military command authority—that coincides with the statute's text and purposes and is already well-defined in the context of allocating military responsibility.

Respondent's approach would also be unworkable (or at least unfortunate) for communities near military installations. As previously explained (U.S. Br. 26) approaches like respondent's and the Ninth Circuit's put a military commander to an all-or-none choice. Under those approaches, even a small concession to public convenience at a base can threaten to oust Section 1382's coverage. Respondent has no choice but to embrace (Br. 60-61) the perverse incentive this creates for a base commander to maximally inconvenience the base's civilian neighbors. No good reason exists for this Court to bring about that result.

4. Finally, respondent's approach would gravely undermine the very interests that Section 1382 is meant to protect. Respondent acknowledges (Br. 29) that the purpose of Section 1382 is to protect military assets. And that was precisely why he was barred. Vandenberg's commander wrote to respondent:

> Based upon your obstructive actions, previous criminal violations, and continued failure to comply with Security Forces personnel during protests, I consider your continued presence on this installation to be a risk and detrimental to my responsibility to protect and preserve order, and to safeguard the persons and property under my jurisdiction.

J.A. 64. As the government previously explained (Br. 22-26), Section 1382 sensibly supplies a first line of defense against such recognized threats. Although its sanctions are modest, they have a beneficial deterrent effect. And although military security forces have inherent authority to remove someone who poses a threat to the base, the statute ensures that authority also exists for law enforcement to arrest someone who is violating base regulations or is a known threat to order on the base.

Respondent is left to claim that Section 1382 serves no purpose at all in many places on a base. He suggests that Highway 1 can present no security concerns, and he invites this Court to ignore the commander's determination here that someone who vandalized base property before presents a clear risk of doing it again. See Resp. Br. 55-62. The defendant in *Albertini* made similar arguments in contending that Section 1382 did not serve sufficiently important interests to pass First Amendment scrutiny. See 472 U.S. at 688-689. This Court rejected those arguments, recognizing the self-evident public interest in the security of military facilities, and deferring to the reasonable judgment of "the responsible decisionmaker concerning the most appropriate method of promoting significant government interests." *Id.* at 689. As previously explained (U.S. Br. 24-26), Section 1382 often has greatest value at the margins of a military installation, or in places on a base that the public can physically access, precisely because of the complex security challenges those places can pose.

Respondent recognizes that if Section 1382 is unavailable, commanders may be forced to await actual damage before taking action. See Br. 59-60 (suggesting that "it is unnecessary to rely on [Section] 1382" because 18 U.S.C. 2155 could be used instead "to punish persons

who entered onto military bases and damaged military property"). But reliance on punishment instead of prevention leaves everyone worse off. The public's property will be damaged instead of preserved. The offender will face a lengthy prison term instead of a modest fine or brief stay in jail. The courts will have to hear a felony case instead of a misdemeanor. And the military mission may be compromised by the damaged property and the need to divert additional resources into base security. Applying Section 1382 across an installation commander's area of command helps avoid those undesirable results.

C. This Court Should Reject Or Remand Respondent's First Amendment Arguments

1. Respondent renews in this Court (Br. 9-22) a First Amendment defense that the court of appeals did not reach. The Court's usual practice is to decide the issue resolved by the court of appeals (here, the scope of Section 1382) and then remand for the lower courts to consider in the first instance any remaining issues. U.S. Br. 26-27. Respondent replies in essence that this Court *can* address his First Amendment argument in the first instance (Br. 21-22) and that it should at least recognize a serious constitutional question that his interpretation of Section 1382 would avoid (*id.* at 9, 24, 52-53). If respondent were correct that the government's construction of Section 1382 raised a serious constitutional question, and that a plausible ground for avoiding it existed, then avoidance principles would come into play. But here, no plausible construction would exclude portions of Vandenberg from Section 1382 and no serious First

Amendment question is raised by construing the statute as written.[9]

2. As this Court recognized in *Albertini*, "Section 1382 is content-neutral" and as such "satisfies the First Amendment" because it "serves a significant Government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security." 472 U.S. at 687; see U.S. Br. 27-28. Whether respondent was in a traditional public forum (Resp. Br. 9-17), a designated public forum (*id.* at 17-18), or a nonpublic forum (*Albertini*, 472 U.S. at 684), such a content-neutral law passes First Amendment muster. See, *e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474 (1988) (upholding content-neutral restriction on picketing on a public street).

Respondent and his amici try to sidestep *Albertini* in three ways. *First*, they mischaracterize the terms of respondent's debarment and the basis of his convictions, asserting that respondent "was allowed to travel on Highway 1, but not to engage in peaceful protest" and that he then "was convicted * * * for engaging in peaceful speech activities." *E.g.*, Resp. Br. 1, 20. That is incorrect. Respondent was barred from *all* of Vandenberg, *whatever* his purpose, and the commander made a concession to convenience in permitting respondent to use the easement for its stated purpose. And respondent

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[9] Respondent's reliance (Br. 54-55) on the rule of lenity is similarly misplaced. "To invoke the rule, [this Court] must conclude there is a grievous ambiguity or uncertainty in the statute." *Dean* v. *United States*, 556 U.S. 568, 577 (2009) (citation omitted). No ambiguity exists about the common core of meaning invoked by the words "reservation, post, fort, arsenal, yard, station, or installation," 18 U.S.C. 1382, and respondent's efforts to artificially limit their reach (see pp. 6-7, *supra*) do not create the requisite ambiguity.

was convicted for being found in a place from which he had been barred on account of his criminal vandalism and obstructive conduct. He was not initially barred for his speech, nor was he later convicted for his speech.

That is a complete answer to respondent's reliance on *Flower, supra*. He quotes the relevant rule from *Albertini*'s explanation of *Flower*: "[W]here a portion of a military base constitutes a public forum * * *, a person may not be excluded from that area on the basis of activity that is itself protected by the First Amendment." Resp. Br. 13 (quoting *Albertini*, 472 U.S. at 685-686). Even assuming Highway 1 satisfies the first half of that equation (but see U.S. Br. 27), the facts of this case fail the second half.

More recently, this Court unanimously refuted petitioner's argument in *Virginia* v. *Hicks*, 539 U.S. 113 (2003). That case involved, *inter alia*, a provision "authorizing the police to arrest those who return to [a certain housing complex] after receiving a barment notice." *Id.* at 123. The Court explained that, "[e]ven assuming the streets of [the complex] are a public forum," applying that provision "to persons whose postnotice entry is * * * for the purpose of engaging in constitutionally protected speech" would not offend the First Amendment:

> [T]he notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return—*regardless* of whether, upon their return, they seek to engage in speech. Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment.

Ibid. The same is true here.

Second, respondent suggests (Br. 53-54) that the practice of issuing and enforcing barment orders is an unconstitutional prior restraint on speech. But a content-neutral rule (such as a barment order) cannot be treated as a prior restraint merely because it may have incidental effects on speech, and respondent cites no case treating a content-neutral rule that way. The law could not be otherwise; if any government action that prevents some speech from occurring is a prior restraint, then nearly any time, place, or manner restriction would be presumptively unconstitutional.

Third, relying principally on the dissenting opinion in *Greer*, respondent argues (Br. 18-21) that Section 1382 does not serve a significant government interest. But this Court has already settled in *Greer* and *Albertini* that securing a military base against known threats to military property and discipline is such an interest and that the second paragraph of Section 1382 is appropriately drawn to serve that interest. "Nothing in the First Amendment requires military commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly." *Albertini*, 472 U.S. at 689.

Respondent would distinguish *Albertini*'s recognition of base security concerns at the open house there from the security concerns raised here. See Br. 20-21. Those situations are indistinguishable for First Amendment purposes largely for the same reasons that they are indistinguishable for statutory purposes. Moreover, testimony at trial established that the presence of someone like respondent at the entrance to the enclosed part of the base does indeed pose security concerns. See J.A. 109. This Court should be as unwilling here as it was in *Albertini* to second-guess such military security judg-

ments. See 472 U.S. at 689 (noting the Court was not "disposed to conclude that [the First Amendment] assigns to the judiciary the authority to manage military facilities").

Respondent's related suggestion (Br. 19) that the government has not identified "an important interest in enforcing the statute against him" is legally unsound and factually incorrect. "The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests." *Albertini*, 472 U.S. at 688. And in any event, Vandenberg's commander *has* identified concerns specific to respondent in his barment order, see p. 16, *supra*, leaving no doubt that the government had an interest in preventing respondent's unwelcome return to Vandenberg.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

NOVEMBER 2013

APPENDIX

Exhibit E-2 from

***Greer* v. *Spock*, 424 U.S. 828 (1976) (No. 74-848)**

E-2

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 28 2013
OFFICE OF THE CLERK

No. 12-1038

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DENNIS APEL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF GROUND ZERO CENTER FOR NONVIOLENT ACTION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Ground Zero Center for Nonviolent Action ("Ground Zero") is a non-profit organization of more than 1,000 members located in Poulsbo, Washington. Since 1977, Ground Zero members have exercised their First Amendment rights by peacefully advocating for the abolishment of nuclear weapons to prevent nuclear war. In this regard, they conduct vigils and peaceful demonstrations near the entrance to the Naval Base Kitsap-Bangor ("Bangor Naval Base" or "Base"), which they have done at least three times a year since 2001. The mission of Bangor Naval Base is to serve as the host command for the Navy's fleet throughout the West Puget Sound and to provide base operating services, including support for both surface ships and submarines homeported at Bremerton and Bangor, Washington. *See* Military.com, Base Guide, Naval Base Kitsap-Bangor, http://www.military.com/base-guide/naval-

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief. Both parties filed with the Court blanket consents to the filing of *amicus curiae* briefs, in support of either party. Counsel for the *Amicus Curiae* authored this brief in its entirety, and no person or entity other than the *Amicus Curiae* and its counsel made any monetary contribution to the preparation or submission of this brief.

base-kitsap---bangor (last visited on Oct. 20, 2013). Approximately 20 percent of the nation's nuclear stockpile is believed to be deployed at Bangor Naval Base.

In addition to conducting peaceful demonstrations near the Base, Ground Zero also owns a house, which serves as its headquarters, and 3.8 acres of land located directly adjacent to the Base, sharing 330 feet of fence with the Base.

A ruling adopting the Government's broad interpretation of 18 U.S.C. § 1382 will have an adverse effect on Ground Zero members' protected free speech activities at and around the perimeters of the Base—peaceful activities which Ground Zero members have engaged in for the last 35 years. Not only would such an adverse ruling have a chilling effect on Ground Zero members' First Amendment rights, but it would also subject Ground Zero members with prior barment letters to criminal prosecution for simply walking along hiking trails located in the woods that surround both the marked perimeters of the Base and Ground Zero's headquarters, or for merely taking a drive on any of the many public roads that lie adjacent to the Base. Affirming the Ninth Circuit's decision is essential to ensuring that Ground Zero members' First

Amendment rights are protected and that their day-to-day peaceful activities remain unimpeded.

SUMMARY OF ARGUMENT

This is a case about protected free speech that occurred in an area officially designated as a protest area located outside a closed military base. The question before this Court is whether individuals such as Respondent, Dennis Apel, and similarly Ground Zero members, can be subject to criminal prosecution under 18 U.S.C. § 1382 for engaging in peaceful protesting under the above described circumstances.

Under the Government's interpretation, the phrase "military installation" in Section 1382 includes not just the restricted and enclosed area that constitutes Vandenberg Air Force Base, over which the military exercises exclusive ownership and control, but also the public road that lies outside the Base that crosses over federally-owned land, which falls within an easement the federal government granted to State and County authorities for public use. Essentially, the Government contends that Section 1382 permits the military to ban or arrest persons with barment letters issued under this statute from appearing on

public streets and roads that cross military-owned land. Such an interpretation, however, would infringe the free speech and due process rights of individuals with prior barment letters, including several Ground Zero members, and, therefore, should be rejected.

For over 35 years, Ground Zero has engaged in peaceful demonstrations outside Bangor Naval Base. These demonstrations generally take place outside the Base, near the Base's main entrance, in a designated protest area located alongside NW Luoto Road, which is an open, public road. Within the designated protest area, which is located outside the "blue line" on NW Luoto Road that marks the boundaries of the closed military base, is a public bus stop. While military and local law enforcement often work closely together with Ground Zero in monitoring the demonstrations, over the years, some Ground Zero members have received barment letters for crossing the blue line as part of their peaceful demonstrations.

Public records reveal that the Navy owns the land on which Ground Zero's longtime protest area is situated, yet there are no signs or other visual indications that the land is Navy owned. In fact, for years, state and county law enforcement officials, who police the area, have told Ground Zero

members that the land is owned by the State. The Navy has increasingly been acquiring property around the Base, including property that surrounds Ground Zero's headquarters which is in walking distance from the Base's main entrance. Much of this land acquired by the Navy, however, is unmarked and publicly accessible, and includes wooded land with hiking trails. Should the Court adopt the Government's broad interpretation of the statute, Ground Zero members with prior barment letters could be subject to arrest for not only engaging in peaceful demonstrations like they have been doing for years, but also for simply walking around their headquarters, or hiking the nearby trails, or driving along any of the public roads located near the Base.

The Government has not adequately identified a significant governmental interest in restricting the ability of individuals, like Ground Zero members, with barment letters from demonstrating on open, public roads, which have long been recognized as quintessential public forums where free speech is generally protected. Thus, the Government's interpretation of the statute should be rejected because it would render the statute unconstitutional as applied to protesters, like Ground Zero members, with barment letters who protest on open, public roads located outside closed

military bases. The Government's interpretation should also be rejected because it would render the statute unconstitutionally vague, since individuals, like Ground Zero members, with barment letters would have no notice or fair warning regarding where they could peacefully demonstrate, or even walk or drive, outside a closed military base without being subject to criminal prosecution under Section 1382.

For all of these reasons, the Court should affirm the judgment of the Court of Appeals overturning Mr. Apel's conviction under Section 1382.

ARGUMENT

Under the doctrine of constitutional avoidance, Section 1382 should be interpreted to avoid the serious constitutional questions that would arise under the Government's broad interpretation of the statute. Under the Government's interpretation, the scope of Section 1382, which by its terms is limited to a "military installation," would extend not only to property that the military exercises exclusive possession, ownership and control over, but also to property the military exercises concurrent control and possession over, including

public roads maintained by state and county officials that cross over federally-owned land. Given Ground Zero's long-term presence at Bangor Naval Base, applying Section 1382 in this manner could, similar to Mr. Apel's situation, result in not only a violation of Ground Zero members' First Amendment rights, but also give rise to a host of additional serious constitutional issues that could be avoided if the Court applies the plain language of the statute. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

I. ADOPTING THE GOVERNMENT'S INTERPRETATION OF SECTION 1382 WOULD MAKE THE STATUTE UNCONSTITUTIONAL AS APPLIED TO PROTESTERS LIKE GROUND ZERO.

The Government's overly broad interpretation of the term "military installation" should be rejected. If the Court interprets the term military installation in Section 1382 as the Government urges, Ground Zero members with prior barment

letters—like Mr. Apel—could be criminally prosecuted for engaging in free speech activities on a public road, in an area specifically designated for protest activities, located outside the closed military installation at Bangor Naval Base, contrary to the First Amendment.

A. LIKE MR. APEL, GROUND ZERO MEMBERS' PROTEST ACTIVITIES OCCUR ON A PUBLIC ROAD IN A DESIGNATED PROTEST AREA OUTSIDE A CLOSED MILITARY INSTALLATION.

Ground Zero members typically demonstrate near the main gate of Bangor Naval Base, which is located at the west end of Washington State Highway 308, also known as NW Luoto Road. Demonstrators stand on the north side of NW Luoto Road (the "Designated Protest Area"), about twenty feet west of an overpass for Clear Creek Road NW, and several feet east of a blue line on NW Luoto Road that marks the entrance to the restricted area of Bangor Naval Base. Beyond the blue line, NW Luoto Road becomes NW Trident Boulevard (Trident refers to the nuclear-tipped missiles carried by the *Ohio*-class submarines based at Bangor). A large sign with six flashing lights is displayed at the blue line which states,

"STOP AHEAD 475 FT." On the same side of the street and inside the Designated Protest Area is a Kitsap County Transit bus stop, which is open to and regularly used by the public. Approximately 100 feet east of the Designated Protest Area—beyond the overpass—is the off ramp for Washington State Highway 3, making that particular area unsafe and unsuitable for demonstrations. *See* Addendum A attached hereto (which is a close-up aerial picture slightly modified to better identify the blue line and the Designated Protest Area), and Addendums B and C attached hereto (which consist of a larger aerial photo and Google map of the area surrounding the main entrance to the Base).

During Ground Zero demonstrations, some Ground Zero members stand on the overpass itself, the west side of which overlooks the entrance to the Base. The rest of Ground Zero demonstrators stand in the Designated Protest Area along NW Luoto Road, the boundaries of which are marked by barricades provided by the Navy.

Ground Zero generally provides advance notice before any demonstrations occur. Law enforcement personnel for the Navy, Kitsap County and the Washington State Patrol ("WSP") work together in planning for, and monitoring, Ground Zero

demonstrations. Ground Zero demonstrators and military and nonmilitary law enforcement have a good working relationship and exhibit a level of mutual respect for each other, since Ground Zero's demonstrations have always been peaceful. Military personnel police the area west of, or inside the blue line on Trident Boulevard, while county and state law enforcement police the area east of or outside the blue line on NW Luoto Road and the overpass. When arrests are made during Ground Zero demonstrations, the military makes arrests for activities that occur inside the blue line on Trident Boulevard, while arrests that occur outside the blue line on NW Luoto Road or the overpass are made by county or state law enforcement. The WSP often tell Ground Zero demonstrators that the barricades that the Navy sets up to mark the boundaries of the Designated Protest Area represent the perimeter of a "free speech" area where Ground Zero members should remain for their safety.

Even though NW Luoto Road is labeled a county road, responses to public records requests made by Ground Zero members indicate that the Navy owns that section of NW Luoto Road west of the overpass, including the Designated Protest Area on NW Luoto Road. However, there are no signs or other visual indications that the land on

which the Designated Protest Area is situated is owned by the Navy. In fact, for years, State and County law enforcement officials, who police the area east of the blue line, have told Ground Zero members that the land is owned by the State.

According to public records, the Navy also apparently owns the west side of the Clear Creek Road overpass, but it has granted a public easement for this portion of Clear Creek Road to Kitsap County. Thus, while it is not entirely clear, it appears that the Designated Protest Area on NW Luoto Road is situated on Navy property, even though the Navy in no way restricts access to this part of the road, or any other part of NW Luoto Road. Nor does the Navy engage in enforcement activities within the Designated Protest Area, or any of the area east of the blue line that marks the boundary of the Base confines.

Public access to the wooded area which lies north of NW Luoto Road, behind the Designated Protest Area on NW Luoto Road, is not restricted in any way. A trail in the woods links Clear Creek Road and NW Luoto Road in this area for pedestrians and bike riders. Within walking distance from the Base's main gate, Ground Zero owns 3.8 acres of land, with a house directly adjacent to the Base.

Over the past several years, the Navy has consolidated Bangor Naval Base with other nearby military operations in order to seek a more central area of command. In doing so, the area surrounding Ground Zero's headquarters has become increasingly surrounded by Navy-owned property. Public records indicate that the Navy owns a large portion of nearby property, much of which is unmarked, unrestricted wooded land with hiking trails.

B. THE PUBLIC ROAD WHERE GROUND ZERO'S SPEECH OCCURS IS A QUINTESSENTIAL PUBLIC FORUM.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. There can be no dispute that Ground Zero's protest activities constitute First Amendment activity. *United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing . . . [is an] expressive activit[y] involving 'speech' protected by the First Amendment.").

Like the public road where Mr. Apel was peacefully protesting, the Designated Protest Area where Ground Zero's demonstrations occur is located on a public road outside the clearly marked

boundaries of Bangor Naval Base. Public streets have long been recognized as quintessential public forums where individuals are permitted to express their views in an orderly fashion. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (recognizing that streets and parks are "quintessential public forums" that have "'immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'") (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

As the Court noted in *Grace*, in places such as public streets, the Government's ability to permissibly restrict expressive activity is limited. Here, "the government may enforce reasonable time, place, and manner regulations [only] as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications.'" 461 U.S. at 177 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45). The Court also recognized in *Grace* that just because a road is publicly owned and operated does not automatically make the road a public forum. Rather, the Court must look at the objective characteristics of the road at issue to determine whether it functions like

a traditional public street. *Id.* at 177-80; *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

In examining the objective characteristics of the public sidewalks at issue in *Grace*, the Court made a point to distinguish the ruling in *Greer v. Spock*, 424 U.S. 828 (1976), that the streets and sidewalks at issue there did not qualify as traditional public forums. In *Grace*, the Court made clear that its holding in *Greer* hinged on the fact that the streets and sidewalks at issue in *Greer* were located *within* the military installation at issue in that case, and thus were noticeably separate from the public streets and sidewalks of the surrounding city. *Grace*, 461 U.S. at 179. In contrast, the sidewalks at issue in *Grace*, the Court noted, had "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the [Supreme] Court grounds that they have entered some special type of enclave." *Id.* at 180. Because the sidewalks serving as the perimeter of the U.S. Supreme Court building were not any different from other public sidewalks in Washington, D.C., the Court held in *Grace* that there was no reason to treat them any differently for First Amendment purposes and ultimately concluded that the sidewalks surrounding the

Supreme Court qualified as traditional public forums. *Id.* at 179-80.

The same can be said about the Designated Protest Area for Ground Zero and NW Luoto Road. Unlike the streets in *Greer*, and similar to the road on which Mr. Apel was peacefully protesting, Ground Zero's Designated Protest Area and NW Luoto Road are both situated *outside* the clearly marked boundaries of Bangor Naval Base. Indeed, similar to Vandenberg Air Force Base, there is a blue line painted on the road to make it clear to all where the public road (NW Luoto Road) ends and the closed military base (Bangor Naval Base) begins. Neither the NW Luoto Road nor the Clear Creek Road overpass that crosses over NW Luoto Road are closed in any way, and traffic on both roads is unimpeded. There are no gates, sentries, or checkpoints to suggest that NW Luoto Road or Clear Creek Road are anything other than ordinary public roads. Presumably, they both cross over federally-owned land, but that land is not enclosed or controlled in any way, unlike the federally-owned land that lies on the military-controlled side of the blue line.

As explained in Respondent's Brief, it does not matter that roads like Highway 1, or NW Luoto Road or Clear Creek Road, abut or lie adjacent to a

closed military installation. (Resp. Br. 24). As the Court expressly declared in *Grace*: "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." 461 U.S. at 180.

For the same reason *Greer* is distinguishable from Mr. Apel's and Ground Zero's cases, the Court's holding in *United States v. Albertini*, 472 U.S. 675 (1985), is also distinguishable because the speech at issue in *Albertini* occurred during an open house that was held within the confines of a military base, not on a public road located outside a military base. The objective factors present in both Mr. Apel's and Ground Zero's cases are more akin to the circumstances present in *Flower v. United States*, 407 U.S. 197 (1972) (per curiam), where the Court reversed a conviction under Section 1382 of an individual who had a prior barment letter and was peacefully distributing leaflets on a public street that, although it was located within the military base in question, was not restricted in any way by the military, but instead was treated as a "public thoroughfare no different than [any] other streets in the city." *Albertini*, 472 U.S. at 685 (describing the facts in *Flower*).

In light of the foregoing, the road where Ground Zero's free speech activities occur, which is similar if not identical to where Mr. Apel's speech occurred, qualifies as a traditional public forum. Accordingly, any restrictions placed on expressive activities that occur there must satisfy a strict scrutiny test applicable to traditional public forums.

C. AT THE VERY LEAST, GROUND ZERO DEMONSTRATIONS OCCUR IN A DESIGNATED PUBLIC FORUM.

As the Court recently explained in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), governmental entities can create what is known as "designated public forums" when "'government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.'" *Id.* at 2984 n.11 (citation omitted). "[S]peech restrictions in [a designated public forum] 'are subject to the same strict scrutiny as restrictions in a traditional public forum.'" *Id.* (citation omitted). Unlike traditional public forums, however, designated public forums are created only by purposeful governmental action. *Ark. Educ. Television Comm'n*, 523 U.S. at 677. Thus, government intent is a critical factor in determining whether a designated public forum has

been created. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Such intent must be discerned from the government's policy and practice. *Id.*

With respect to Ground Zero, the Navy's intent to establish a designated public forum could not be more clear. The Navy routinely places barricades outside the main gate of Bangor Naval Base alongside NW Luoto Road to identify where Ground Zero members are permitted to engage in peaceful protests. Moreover, about half of Ground Zero members who regularly attend demonstrations (approximately 50 individuals) have prior barment letters issued to them under Section 1382, yet these individuals are routinely permitted to engage in peaceful protests that take place in the Designated Protest Area along NW Luoto Road. It is only when a Ground Zero member with a barment letter walks past the blue line and steps onto the military side of the blue line that military personnel will arrest Ground Zero members under the "reentry" provision in Section 1382. Only a few Ground Zero members with barment letters have done this; most Ground Zero members with barment letters understand that crossing the blue line may subject them to criminal charges under the "reentry"

provision of Section 1382 and choose not to engage in such activity.[2]

In light of its established policy and procedure, the Navy should not now be heard to argue that it has not purposefully created a designated public forum for both Ground Zero members, and the public at large, to engage in expressive activity. And, having purposefully created the designated public forum, the Navy cannot impose restrictions on that activity, under the auspices of Section 1382, without first establishing that such restrictions meet the strict scrutiny test identified above and discussed below.

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[2] To be clear, Ground Zero members do not challenge the Navy's authority under Section 1382 to seek criminal prosecution of Ground Zero members with prior barment letters who cross the blue line to enter the Base confines. Rather, Ground Zero's primary concern here is that, should the Court adopt the Government's broad interpretation of Section 1382, Ground Zero members with prior barment letters will no longer be permitted to engage in the peaceful protests that they have been permitted to engage in over the years outside the Base.

D. NO SIGNIFICANT GOVERNMENT INTEREST EXISTS TO JUSTIFY RESTRICTING GROUND ZERO MEMBERS' SPEECH WITHIN THE DESIGNATED PROTEST AREA.

The Government's interpretation of Section 1382 would define an unrestricted, publicly accessible road as a "military installation," as long as the underlying property is owned by the military, permitting it to restrict access to and speech on the otherwise public road. The Government claims this interpretation is necessary to prevent "substantial harm to the safe and orderly operation of many of this nation's military installations." (Pet. 14.) Tellingly, the Government provides no support for this claim. None exists. Instead, the Government grasps at generalities that have no relevance to the facts of this case. But courts, including this Court, have regularly held that such ill-defined and abstract concerns are insufficient to justify speech restrictions, and for good reason—theoretical risks abound in all public areas throughout the country. Such a loose standard would permit speech restrictions anywhere, for any reason, and would swallow the First Amendment whole.

As previously noted, in traditional public forums, as well as designated public forums, the Government can enforce laws that restrict the time, place, and manner of speech. *Carey v. Brown*, 447 U.S. 455, 476 (1980). However, these restrictions must be narrowly tailored to a significant government interest, and leave open ample alternative channels of communication. *Id.* While "courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008), here, the Government has not adequately identified a "particular military interest."

In Mr. Apel's case, the Government claims its interpretation of Section 1382 is needed to bar certain people from demonstrating within a small area dedicated to free speech, located at least 200 yards away from any restricted or closed military area. (Br. in Opp. 1, 3-4.) The Government claims this interpretation is justified because to do otherwise would limit its authority to "remove and sanction civilians who refuse to comply with base rules and regulations." (Pet. 15). This is nonsensical, because the Government's interpretation would not prevent it from arresting a person who broke a rule or regulation.

Indeed, affirming the Court of Appeals would not limit the Government's authority to arrest or prosecute a person who threatens to, for example, shoot someone, *see* Pet. at 15 (discussing factual circumstances behind *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011)); climb atop a nuclear submarine, *see United States v. Allen*, 924 F.2d 29, 30 (2d Cir. 1991); or trespass near a live impact zone, *see United States v. Ventura-Melendez*, 275 F.3d 9, 12 (1st Cir. 2001). It would not limit the Government from arresting a person who walks into restricted areas of a base, or even from limiting access to temporarily public places within restricted areas, as in *Albertini*. Indeed, it would not even have impacted the Government's ability to arrest Mr. Apel for trespassing and throwing blood on a sign, the behavior for which he initially received a barment letter. (Pet. 14.) All of these bad behaviors remain unlawful and punishable. The Government has provided no evidence that high-level security risks—such as a would-be terrorist—are even likely to be subject to barment letters in the first place.

The Government's interpretation would do no more than allow it to arrest a person for standing in an unrestricted public area, assuming the area is owned by the military and the person happened to get kicked off a military base at some point in the

past, regardless of how long ago. While the Government may *want* this ability in order to limit or stop potentially disruptive protestors, it hardly qualifies as necessary to prevent "substantial harm to the safe and orderly operation of many of this nation's military operations." (Pet. 14.)

Stripped of hyperbole, this case involves a man (Mr. Apel) who stood on the side of a public road. Similar to Ground Zero's circumstances, the Government does not restrict access to any portion of the road where Mr. Apel engaged in peaceful protesting, except the designated area on which he stood. (Br. in Opp. 1, 3-4.) Similar to Ground Zero's circumstances, anyone can drive, or ride as a passenger in a car, on the public roads at issue. Anyone can enter a nearby Visitors' Center to learn more about the Base, or buy an American flag, or talk to the tour guides. Anyone can get on or off the bus at the nearby bus stop. While military commanders are properly concerned about serious security threats, keeping protestors off public roads does little, if anything, to mitigate those threats. The risk of theoretical dangers exists in all public places, and would exist outside Vandenberg Air Force Base, or Bangor Naval Base, even if the Court were to adopt the Government's position. Such abstract fears, however, are insufficient to justify a speech restriction. *See, e.g.*, *Bay Area*

Peace Navy v. United States, 914 F.2d 1224, 1227 (9th Cir. 1990) (rejecting Navy arguments based on "the existence of terrorism in the world generally and the opinions of various military personnel that a 75- or 100-yard zone was needed to protect against acts of terrorism").

In Ground Zero's case, all of its protest activities over the years have been peaceful, and no Ground Zero member has ever received a barment letter for violent or destructive conduct. Thus, in Ground Zero's case, an expansion of the scope of Section 1382 on grounds of "base safety" would be completely unfounded.

E. THE GOVERNMENT'S INTERPRETATION OF SECTION 1382 IS NOT NARROWLY TAILORED TO ITS PURPORTED INTEREST IN SAFETY.

Even if the Government identified a significant governmental interest, which it has not, the Government's broad interpretation of Section 1382 is not narrowly tailored to achieve its purported interest in safety. The Government essentially contends that the Ninth Circuit's decision forces it to take all comers or restrict access to Highway 1 entirely. But this argument overlooks the fact that the Government *already accepts all comers* (in both

Mr. Apel's and Ground Zero's case), along with all attendant risks, and thus its interpretation in this regard would do no more than allow it to selectively bar entry to a designated free speech zone. Adopting the Government's interpretation of Section 1382 would thus "burden substantially more speech than is necessary to further the government's legitimate interests," making the law "substantially broader than necessary to achieve the government's interest" in ensuring base safety. *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 800 (1989).

For example, the Government's interpretation of Section 1382 would permit it to restrict concerned citizens from engaging in peaceful demonstrations on public streets, if those streets happened to be owned by the military, based on a non-violent transgression that may have occurred decades earlier.

Ground Zero member Glen Milner illustrates this point. Mr. Milner received a barment letter for trespassing in 1987, after he crossed the blue line at Bangor Naval Base and knelt in prayer. Unlike the transgressors in *Parker*, *Allen*, and *Ventura-Melendez*, Mr. Milner did not in the past, nor has he presently, engaged in any destructive or threatening behavior, nor has he sought to push

the limits of his barment letter. In fact, Mr. Milner has repeatedly inquired as to the status of his barment letter to ensure compliance therewith. However, for a variety of convergent reasons described in more detail below, the Government's interpretation would permit the Navy to arrest Mr. Milner—who presents no threat whatsoever—for doing no more than standing outside Ground Zero's headquarters. Meanwhile, the Government's interpretation would do nothing to prohibit a disruptive individual from driving off NW Luoto Road and onto the restricted areas of Bangor Naval Base.

By contrast, even accepting the Government's implausible claim that selectively barring people from a "designated protest zone" helps stop people from leaving the protest zone to climb atop nuclear submarines, for example, it would not stop anybody from leaving a nearby Visitors' Center and doing the same thing, or from simply driving off-road and running onto the Base to interrupt training in a live impact zone. If indivudals really wanted to cause havoc, they have plenty of ways to do so—and the Government has similarly ample authority to stop them from doing so. *See, e.g.*, 50 U.S.C. § 797 (violation of defense property security regulation); 18 U.S.C. §§ 795, 797 (offenses related to photographing defense installations); 18 U.S.C.

§ 1381 (enticing desertion from the Armed Forces); 18 U.S.C. § 1361 (damaging government property); 18 U.S.C. § 1389 (hate crimes against service members, their immediate families and their property); 18 U.S.C. § 1362 (damaging government communication lines); 18 U.S.C. §§ 2387, 2388 (advising mutiny and other subversive activities); 18 U.S.C. § 81 (arson of military or naval property). The Government's interpretation of Section 1382 is unnecessary, and not particularly helpful in ensuring base security; it therefore fails to "promote[] a substantial government interest that would be achieved less effectively absent the regulation" as required to be narrowly tailored, because it does not promote the Government's purported safety interest at all. *Albertini*, 472 U.S. at 689.

F. THE GOVERNMENT'S "GREATER-INCLUDES-THE-LESSER" ARGUMENT CANNOT JUSTIFY A SPEECH RESTRICTION.

The Government argues that because it is not required to permit unrestricted access to military-owned property, it could respond to the Ninth Circuit's interpretation of Section 1382 by simply cutting off access to its property entirely. Leaving aside legal and logistical issues of whether this is

even lawful in light of the easement, the highway, and the bus stop at issue in Mr. Apel's case, the Government's argument is misplaced. The Court has repeatedly held that the Government cannot enforce exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place, unless the exclusion is narrowly tailored to a significant government interest. *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state cannot selectively limit attendance at university meeting facilities); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater). Put simply, once the Government opens an area to the public for expressive activity, it must overcome the strict scrutiny test applicable to a traditional public forum, which it has not done here.

G. THE GOVERNMENT'S INTERPRETATION OF SECTION 1382 WOULD ENTIRELY RESTRICT THE ABILITY TO DEMONSTRATE OF CERTAIN GROUND ZERO MEMBERS.

Similar to the situation at Vandenburg Air Force Base, the military owns much of the land surrounding Ground Zero's normal demonstration

area—potentially including the demonstration area itself. The Navy also purchased land adjacent to Ground Zero's headquarters, and has begun a consolidation effort, incorporating distant, non-adjacent areas into Bangor (such as the Keyport Naval Center, which is 3.5 miles away from Bangor Naval Base). Most of this area acquired by the Navy is publicly accessible, and almost none of it is marked as Navy-owned property.

If the Government is permitted to use Section 1382, as urged, to prohibit demonstrating in areas that are otherwise accessible to the public, many Ground Zero members would be unable to participate in Ground Zero demonstrations. The Navy could arrest any member of Ground Zero with a prior barment letter (such as Mr. Milner) who enters the Ground Zero demonstration area, notwithstanding the fact that Mr. Milner and other Ground Zero members have long been permitted to do so. In addition, many Ground Zero members would be unable to safely walk to and from, and around, the Ground Zero headquarters, or visit other, unmarked Navy-owned public areas on the Kitsap Peninsula. [3] Therefore, applying the

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[3] Moreover, it is unclear how the Navy could possibly enforce Section 1382 in an even-handed manner, should the Government prevail. Both NW Luoto Road in Washington and

Government's interpretation would completely foreclose any demonstrations by Ground Zero members with barment letters, which would be unlawful.

Ground Zero's concern is not fanciful. On the basis of his 1987 barment letter, for example, the Navy has informed Mr. Milner that he would be arrested for attending a public hearing held at the Keyport Naval Center—3.5 miles away from Bangor Naval Base—because the Center is similarly owned by the Navy. As the Navy continues to consolidate resources and purchase

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Highway 1 in California are public roads. Each road is home to a public bus stop. The Government has given no indication that it seeks to prohibit Mr. Apel, or others with barment letters, from driving on Highway 1, suggesting that the Government here seeks to *selectively* apply Section 1382 to people wishing to demonstrate in a protest zone. But if the Government *did* seek to apply Section 1382 in an even-handed manner so as to prohibit all persons with barment letters from accessing *any portion* of any military-owned land, such as driving on Highway 1 or taking the bus from NW Luoto Road, it would necessarily have to do one of the following things: restrict access to these areas (either entirely or intermittently) in order to screen for persons with barment letters, or increase surveillance of those with barment letters and the public area generally. Either scenario creates a host of unique problems too numerous to address here, apart from what has already been addressed.

surrounding land, affirmance of the Ninth Circuit's interpretation of Section 1382 is vital to ensure the ability of many Ground Zero members to participate in demonstrations, as well as to move about freely in otherwise unrestricted public areas surrounding the Base.

Importantly, Ground Zero does not argue that Section 1382 should be abrogated so as to limit military authority to punish actual wrongdoers or those who present an actual threat. What Ground Zero seeks, and what is ultimately the heart of this case, is an interpretation of Section 1382 that preserves the right of all citizens to peacefully demonstrate in areas which are open to the public for expressive activity.

II. THE GOVERNMENT'S INTERPRETATION MAKES THE STATUTE UNCONSTITUTIONALLY VAGUE.

The Government's interpretation of Section 1382 would also render it unconstitutionally vague. The Navy owns much of the land surrounding Bangor Naval Base and Ground Zero headquarters; yet, much of this land is unmarked and unrestricted. As a consequence, Ground Zero members—and citizens generally—may not know when they cross from public land to

military land. Thus, Ground Zero members with barment letters would lack notice as to whether their presence on a particular tract of land could invite criminal liability.

A. THE DUE PROCESS CLAUSE REQUIRES LAWS TO PROVIDE FAIR WARNING.

To comport with the Due Process Clause of the Fifth Amendment, a law must provide fair warning of the actions it either prohibits or requires. *Marks v. United States*, 430 U.S. 188, 196 (1977). In order to provide fair warning, a law must not be vague, and, "either standing alone or as construed, [must make] it reasonably clear at the relevant time that the [conduct proscribed is] criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997). This is particularly true when the law in question "implicates First Amendment values." *Marks*, 430 U.S. at 196.

The void for vagueness doctrine "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Lanier*, 520 U.S. at 266 (citation omitted). An act is void for vagueness if it (1) fails to provide sufficient notice to regulated parties regarding what is

required or prohibited or (2) fails to provide precision and guidance necessary to avoid arbitrary and discriminatory enforcement. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Put simply, a law must make it clear what a person can and cannot do. While "[a] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), a vague law with no *mens rea* requirement risks becoming "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979).

Where, as here, a law implicates expressive activity, the Court has been particularly aggressive in its enforcement of the prohibition against vagueness. Indeed, when the First Amendment is at issue, "rigorous adherence" to the fair warning and vagueness requirements "is necessary to ensure that ambiguity does not chill protected speech." *Id.* Thus, unlike in other contexts, the Court will entertain facial challenges to vague laws that impact expressive activity. *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (sustaining facial constitutional challenge to statute prohibiting "annoying" conduct).

B. GROUND ZERO MEMBERS WITH BARMENT LETTERS WOULD LACK FAIR WARNING OF POSSIBLE VIOLATION OF SECTION 1382 IF THE COURT ADOPTS THE GOVERNMENT'S INTERPRETATION.

If the term "military installation" in Section 1382 is interpreted to include unmarked, unrestricted, publicly accessible land, as the Government claims it should be, such an interpretation would devastate Ground Zero's ability to demonstrate (or even organize) effectively, which is something it has been doing for over 35 years. The Government's interpretation would impact Ground Zero's ability to freely traverse the seemingly public lands surrounding its headquarters, and would provide no "fair warning"—or any warning at all—as to where its members with past barment letters can, and cannot, be.

Put another way, the Government's interpretation of Section 1382, which necessarily includes in "military installation" unmarked, unrestricted, publicly accessible land that happens to be owned by the military, would render the statute unconstitutionally vague when applied to the factual circumstances pertinent to Ground

Zero. First, because a public records review suggests that the Navy *may* own the land on which the publicly accessible Designated Protest Area on NW Luoto Road is located, the Government's interpretation could permit the Navy to arrest Ground Zero members with past barment letters (like Mr. Milner) when they participate in demonstrations, even though the area is publicly accessible and contains no indication that it is military property. Indeed, the context—the blue line, the barricades, local law enforcement—arguably suggests that the area is locally owned by the county or state. These circumstances fail to provide even a modicum of fair warning.

Second, because the Navy continues to purchase property surrounding Bangor Naval Base and Ground Zero headquarters, as well as property elsewhere in Kitsap County, Ground Zero members with barment letters could not safely demonstrate—or even set foot—*anywhere* in the area without fear of arrest. Indeed, the Navy has already indicated its belief that Section 1382 applies to noncontiguous property. Moreover, Section 1382 contains no *mens rea* requirement sufficient to preclude vagueness—Ground Zero members with barment letters thus risk arrest regardless of whether they intentionally, knowingly, or even accidentally traverse nearby

land. Against this backdrop, there would simply be no way for a Ground Zero member to reasonably know, "at the relevant time," that entry into a particular tract of land was "criminal." *Lanier*, 520 U.S. at 267. The Government's interpretation of Section 1382 thus renders the statute unconstitutionally vague and does not provide the requisite fair warning that criminal statutes are required to provide.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED, this 28th day of October, 2013.

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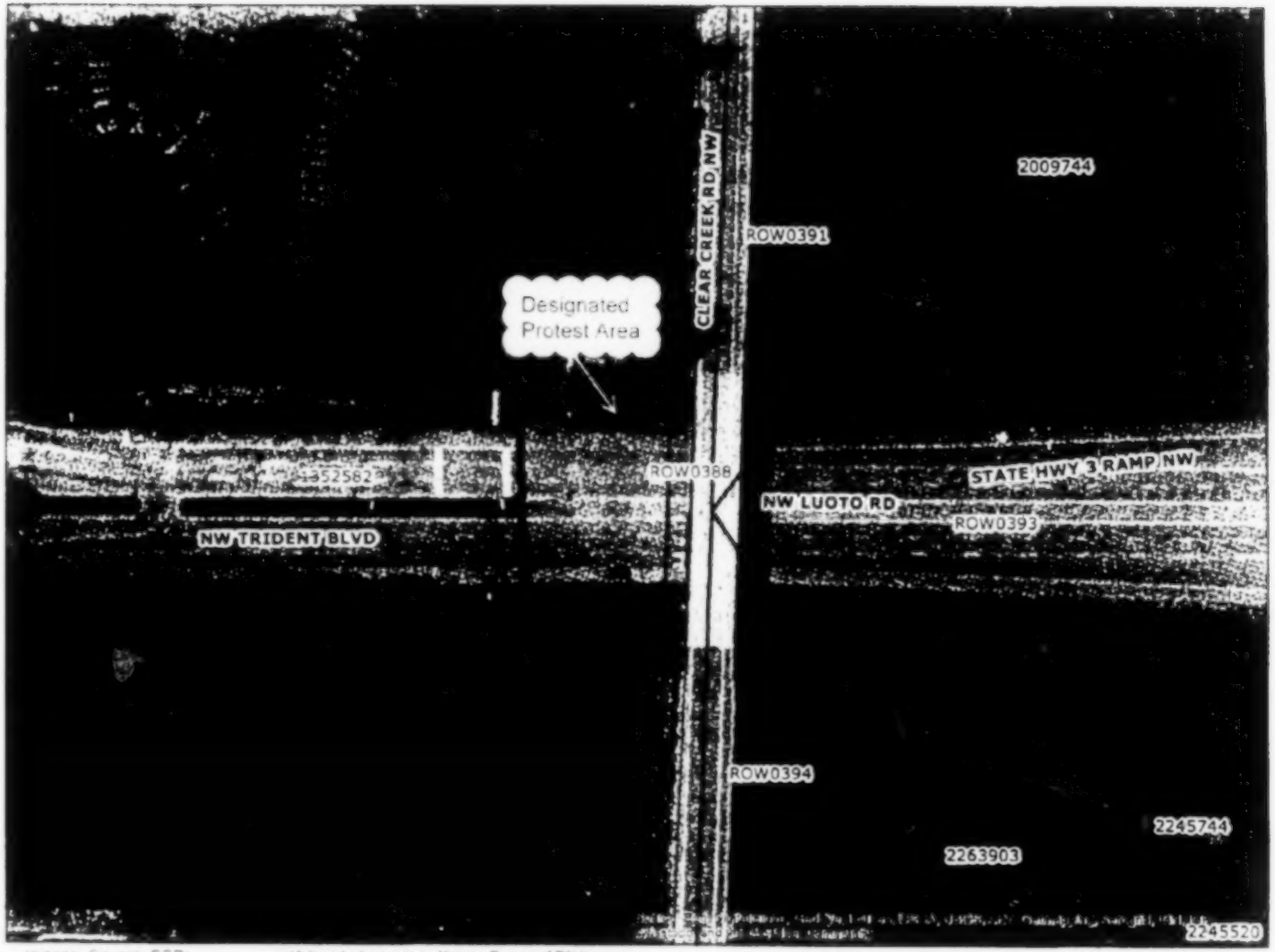
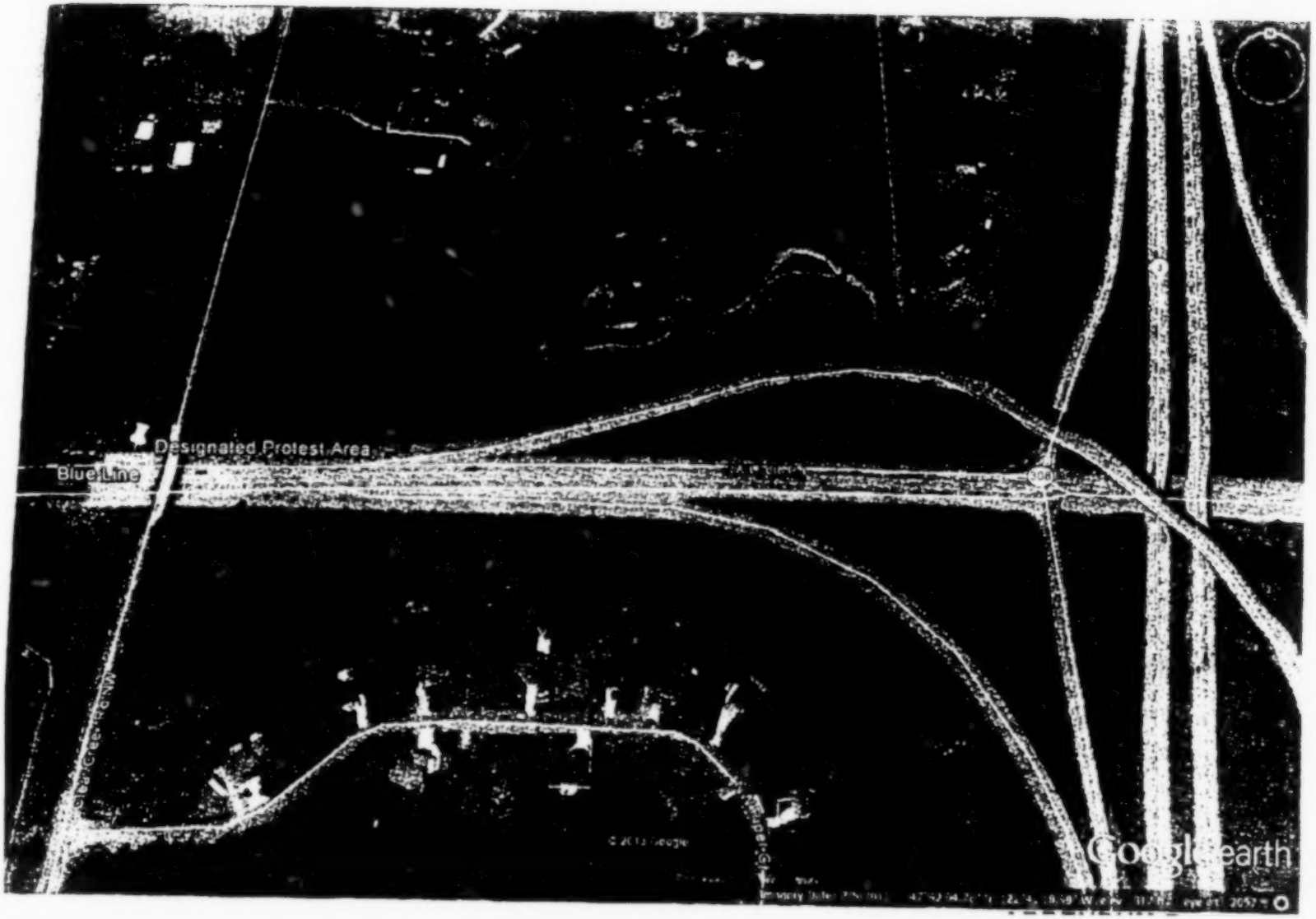
ADDENDUM A

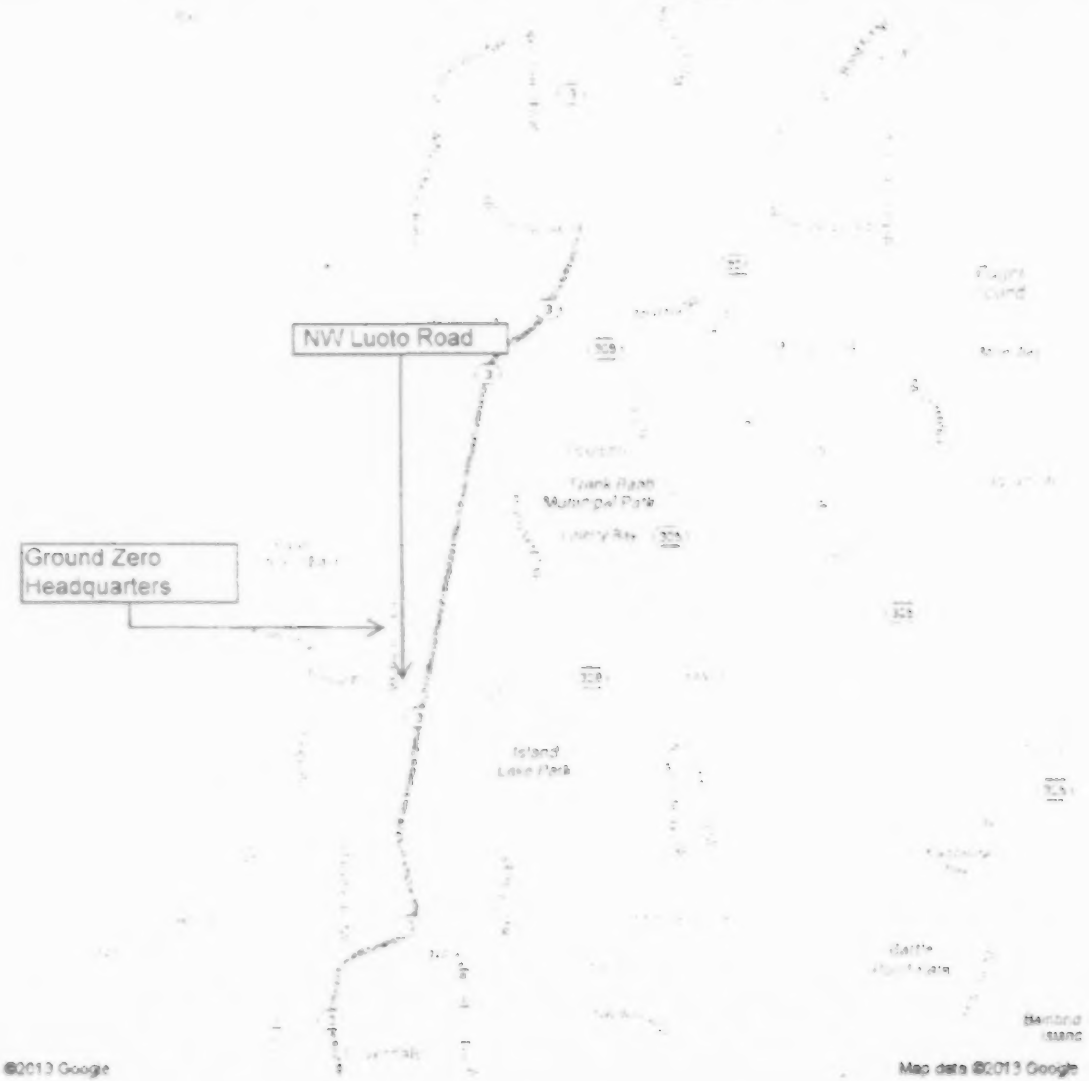


Imagery Source: ESRI Yellow Labels show Kitsap County APNs

ADDENDUM B


Designated Protest Area
Blue Line
Google earth

ADDENDUM C


NW Luoto Road
Ground Zero
Headquarters
Island
Lake Park
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Map data ©2013 Google

ADDENDUM C

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 28 2013
OFFICE OF THE CLERK

No. 12-1038

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DENNIS APEL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Respondent John Dennis Apel in *United States v. Apel*, No. 12-1038.[1]

NACDL is a nonprofit organization with a direct national membership of more than 10,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts. Because this matter relates to a criminal statute with potentially broad applications (18 U.S.C.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

Also, on July 16 and July 23, 2013, Petitioner and Respondent, respectively, generally consented to the filing of *amicus curiae* briefs in this matter.

§ 1382), NACDL has a unique interest in the validity and enforcement of the criminal statute and submits this brief in support of Respondent.

SUMMARY OF ARGUMENT

This appeal concerns the scope of the government's authority under 18 U.S.C. § 1382 to prosecute conduct, even expressive conduct, near military installations on federally owned land. The central question is whether the definition of "military installation" should be interpreted so broadly as to reach expressive conduct occurring in a designated protest area, along a public road, beyond a visible green line painted by the military to demarcate the closed military base.

There is no real dispute that the government has never previously taken the sweeping position it takes now: that even peaceful protesting on a public highway outside of the area under the military's exclusive possessory control is subject to Section 1382. To the contrary, the government stipulated to the requirement of exclusive possession back in the 1940s in *United States v. Watson*, 80 F. Supp. 649 (E.D. Va. 1948), and since then a long line of cases has continued to apply that requirement to Section 1382 prosecutions. Even the United States Attorney's Manual and relevant Air Force regulations adopt this limitation on Section 1382's reach. *See* Respondent's Brief [hereinafter "Resp. Br."], Part II.B.

The rationale behind this longstanding limiting principle is obvious. Although great deference is given to the military's authority to regulate conduct within the closed portions of military installations, serious concerns arise when the government seeks to exercise that virtually unquestioned authority (including to control expressive conduct) in areas outside of an actual military installation and beyond its exclusive area of command. Yet, the government seeks that expansion in this case. Not only does the government claim the right to extend its regulatory and prosecutorial control onto a public road outside of a closed military installation, the government offers no limiting principle whatsoever for when and how it can exercise such authority.

Amicus curiae and its members oppose the unfettered expansion of the government's ability to selectively criminalize conduct, particularly expressive conduct in areas traditionally and apparently open to the public. And the government's sweeping new interpretation of Section 1382 raises serious concerns for *amicus curiae*:

- First, the government's interpretation extends the military's authority – both to apply existing military regulations and to promulgate new (and more onerous) regulations – onto a public road, which raises substantial overbreadth concerns that should be avoided.
- Second, the government's interpretation permits the government too much leeway to arbitrarily enforce Section 1382 against civilians,

including those who lack sufficient notice that they are in areas subject to enforcement.

- Third, the government's interpretation at most creates an ambiguity about the historical and common-sense understanding of the term "military installation," which should be resolved in favor of defendants under the rule of lenity.

Any of these concerns would justify rejecting the government's interpretation of Section 1382. Together, they form a compelling picture of the dangers of overextending the government's ability to control protected activity in public areas that have been historically understood, even by the government itself, to be beyond its reach. Accordingly, *amicus curiae* submits this brief in support of Respondent John Dennis Apel and respectfully requests that this Court affirm the judgment in his favor.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1382 WOULD RENDER THE STATUTE UNCONSTITUTIONALLY OVERBROAD

John Dennis Apel was convicted in the district court of a violation of 18 U.S.C. § 1382 for engaging in protected speech on a public, unrestricted road outside of the visible green line that the military painted

on the ground to demarcate the closed military installation at Vandenberg Air Force Base ("Vandenberg"). The court of appeals, relying on its decision in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011), reversed the conviction. Joint Appendix [hereinafter "App."] 4, Dkt. No. 33; App. 11, Dkt. No. 31; App. 18, Dkt. No. 31. In *Parker*, a protestor had been prosecuted for engaging in expressive conduct on a public road that ran outside the military installation at Vandenberg. 651 F.3d at 1182. The court of appeals relied on a long line of precedents requiring "the government to prove its absolute ownership or exclusive right to the possession of the property upon which the violation occurred." *Id.* In reversing Parker's convictions, the court of appeals reaffirmed the longstanding reading of Section 1382 as not applying to public areas where the government did not have exclusive right of possession. *Id.* In this appeal, the government argues that *Parker* was wrongly decided and advances a new interpretation of Section 1382 that authorizes the government to regulate, cite, and criminally prosecute expressive conduct even if it takes place on a public road outside of the actual military installation but inside of government property lines.

As Respondent amply demonstrates, this new interpretation contravenes military regulations, legislative history, and precedent. Resp. Br., Parts II.A.-II.B. In addition, *amicus curiae* and its members believe this new interpretation would be a significant expansion of the government's power to criminalize

expressive conduct (even on public roads), which would create substantial overbreadth problems that should be avoided. *Cf. Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

A. A statute is facially overbroad when there is a realistic danger that it will significantly compromise speech rights.

Statutes are unconstitutionally overbroad when they criminalize substantially more speech and expressive conduct than may be constitutionally regulated. In a typical facial attack, a challenger must establish that "'no set of circumstances exists under which [the statute] would be valid' or that the statute lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997)). By contrast, according to the Court's overbreadth doctrine, a statute is facially unconstitutional if it prohibits a substantial amount of protected speech as "judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citation omitted); *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003).

Under the overbreadth doctrine, even an individual whose own speech may constitutionally be prohibited under a given provision is nonetheless permitted to challenge its facial validity because of the threat that the speech of individuals and groups not before the court will be chilled. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). In other words, the overbreadth doctrine is necessary to protect the First Amendment rights of speakers who may fear challenging the proscription on their own. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) ("This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.").

In applying the overbreadth doctrine, there must be a "realistic danger" that the provision will significantly compromise speech rights. *Board of Airport Comm'rs*, 482 U.S. at 574 (citation omitted). A law will not be facially invalidated simply because it has some conceivably unconstitutional applications. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). To support a finding that a prohibition on speech is overbroad, there must be a substantial number of instances in which the provision will violate the First Amendment. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

B. The government's new interpretation of Section 1382 would extend existing military regulations onto public roads, thereby infringing on a substantial amount of protected speech in a public forum.

At the outset, it is important to recognize that the court of appeals' narrower interpretation of Section 1382 leaves in place the military's broad power to regulate conduct, even expressive conduct, on the actual military installation. The closed portions of military installations are exclusively within the possessory control of the military. A military installation is "the enclave of a system that stands apart from and outside of many of the rules that govern ordinary civilian life" and, as such, greater deference is afforded to a base commander's discretion within such enclaves "because of the unique character of the Government property upon which the expression is to take place." *Greer v. Spock*, 424 U.S. 828, 842-43 (1976) (Powell, J., concurring). In the case of protestors who cross over the green line demarcating the closed military installation at Vandenberg, existing rules and regulations provide the base commander with the ability to carry out "the basic function of a military installation," including the ability to regulate and even exclude protestors "from the area of his command." Petitioner's Brief [hereinafter "Pet. Br."] 2, ¶ 1.

In exercising this authority over areas under their exclusive possessory control, base commanders

at Vandenberg have issued a series of regulations pursuant to Section 1382 that regulate even expressive conduct. For example, existing regulations permit the base commander to prohibit expressive conduct on the military installation:

- If he does not deem it "peaceful" or "nonpartisan." *See* App. 50, 52, 53 ("Activities other than peaceful protests in this area are not permitted and are specifically prohibited."); 63 (faulting Mr. Apel for allegedly refusing "to remain in the area approved by me for nonpartisan, peaceful demonstrations").
- If he does not consider it to be "adequately coordinated and scheduled." *See* App. 52 (requiring notification of protests "at least two (2) weeks in advance" and reserving right to deny permission to protests that "the installation is unable to support").
- If it involves the "distribution of any materials including pamphlets, leaflets, handouts, etc." *See* App. 53.
- If he finds it may "encumber the roadways or engage in activities which can result in unsafe conditions for themselves or others." *See* App. 50.
- If he believes it could "materially interfere with or have a significant impact on the conduct of the military mission of the U.S. Air Force." *See* App. 50.

Notably, many of these existing regulations contain a degree of vagueness to them – for example, it is

left to the base commander's discretion to determine what conduct is considered sufficiently "nonpartisan" to permit. On the closed portion of the military installation, a certain degree of flexibility is tolerable because of the recognized need for a base commander to exercise virtually total control over soldiers and conduct military operations within the actual installation. *Greer*, 424 U.S. at 838 ("[I]t is consequently the business of a military installation . . . to train soldiers, not to provide a public forum."). Even within the confines of the closed portion of the military installation, however, a base commander may not infringe on expressive conduct arbitrarily. *See id.* at 840 (upholding regulations on political speeches on installation within military's exclusive jurisdiction but acknowledging that "[i]t is possible, of course, that [military regulations] might in the future be applied irrationally, invidiously, or arbitrarily").

The problem arises when the government seeks, as the government does here, to extend a base commander's near total authority to regulate expressive conduct *onto a public road* where the government has deliberately and expressly ceded exclusive control. *See Flower v. United States*, 407 U.S. 197, 198 (1972) ("Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue."). Access to the stretch of the Pacific Coast Highway at issue is not limited. App. 78-79. No guards or gates restrict civilians from entering that stretch. *Id.* And there are no signs along the road that would indicate

that this stretch is treated differently from any other stretch of public highway. The well-trafficked public highway in this case is "equivalent in every relevant respect to a city street." *Greer*, 424 U.S. at 844 n.1 (Powell, J., concurring) ("Fort Dix, in contrast, is a discrete military enclave in a predominately rural area."). The stretch of highway is not simply an access road to the actual military installation, but rather a thoroughfare by which the public accesses, among other public sites, the city of Lompoc, the city of Guadalupe, Vandenberg Village, and Surf Beach. App. 64, ¶ 2. This road, therefore, is a public forum in which civilians have a reasonable expectation of being able to engage in expressive conduct. *Flower*, 407 U.S. at 198-99 ("[S]treets are natural and proper places for the dissemination of information and opinion. . . . [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.") (citations and internal quotation marks omitted).

The government attempts to extend the application of Section 1382 into this public forum, in which a broad swath of otherwise protected speech and expressive conduct could then be regulated by the government. Indeed, under the government's current interpretation, receiving a barment letter would disqualify a civilian from engaging in protected speech *on a public road* even if:

- The protest is "peaceful" and "orderly." *See* App. 54 ("**Barment from Vandenberg**

> **AFB**: If you are currently barred from Vandenberg AFB, there is no exception to the barment permitting you to attend peaceful protest activity on Vandenberg AFB property."); 103 (noting that Mr. Apel was "acting in an orderly manner" on the day of his arrest).

- The protest is properly scheduled. *See* App. 102 (noting that Mr. Apel was participating in a "scheduled protest" on the day of his arrest).
- The protest violates no rules or regulations other than the "ban-and-bar." *See* App. 103 (noting that Mr. Apel had violated no rules other than being present on the public road while being listed on the "ban-and-bar").
- The protest presents no threat whatsoever to military operations. *See* App. 103 (noting that Mr. Apel did not present "a security risk to base personnel or property or operations").

This would be the result of extending existing regulations, which were previously justified to allow the military to regulate conduct within a closed installation, onto the public road outside of the closed installation. Because this would infringe on new categories of expressive conduct that otherwise would be protected by the First Amendment, it raises serious and substantial overbreadth concerns. *New York State Club Ass'n*, 487 U.S. at 14.

C. The government's new interpretation of Section 1382 would also authorize base commanders to promulgate new military regulations that could further restrict protected speech on public roads.

The aforementioned concerns would be present if a base commander simply extended existing Section 1382 regulations to the public road. Yet there is no guarantee that those are the only situations that could give rise to enforcement. Nothing constrains the military's ability to issue new, more onerous rules and regulations than the ones that it currently advances. For example, a base commander could promulgate new regulations prohibiting "anti-military" speech on the public roads adjacent to the actual military installation, or selectively choose which protestors are sufficiently pro-military to allow on the public roads running through Vandenberg. And nothing constrains the military's ability to change its mind after promulgating such regulations. *See, e.g.*, App. 57-58, ¶ 3 (stating that "permission may be withdrawn" by any installation commander, in which case "no protest activity would be permitted at any time until further notice from the installation commander").

Indeed, the government's sweeping interpretation of Section 1382 attempts to reserve the power to broadly regulate *any* speech and conduct in *any* areas within military property lines, even areas outside the physical boundaries of the actual military installation that have been specifically opened to the public. *See* Pet. Br. 2, ¶ 1 (asserting that base commander's

"historically unquestioned power" extends even to public roads with designated areas open to the public); App. 51, ¶ 2 (subjecting roadway easements "to any rules and regulations the Installation Commander may prescribe to properly protect the interests of the United States"); *see also infra* n.2 (discussing the limited ability to appeal a base commander's issuance of a barment order). It is difficult to imagine what kind of speech on a public road could not be regulated by a base commander under the government's sweeping interpretation of Section 1382. The amount of speech on a public road that would be subject to regulation "ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm." *United States v. Alvarez*, 132 S. Ct. 2537, 2547-48, 2555 (2012) (Breyer, J., concurring) (striking down Stolen Valor Act on the ground that it gave the government "a broad censorial power unprecedented in this Court's cases or in our constitutional tradition"). Because a substantial amount of protected speech would be regulated by the government's new interpretation of Section 1382, and substantially exceeds any legitimate restriction of speech on a public road, the government's interpretation of Section 1382 suffers from overbreadth. *See Washington State Grange*, 552 U.S. at 449 n.6.

II. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1382 ENCOURAGES ARBITRARY ENFORCEMENT BY THE GOVERNMENT, EVEN AGAINST CIVILIANS WHO LACK NOTICE OF HOW THE LAW IS APPLIED

The government's new interpretation of a "military installation" also raises the troubling possibility that the government could target *specific* protected speech for regulation and prosecution and engage in arbitrary enforcement. Here, the government seeks to expand both its military *and* criminal jurisdiction over a public road outside of a closed installation. Not only could the government use this discretion to impermissibly chill viewpoints of certain protestors, it would be particularly unfair when applied to protestors who reasonably believe they are within their rights to be on the public road.

A. The government's interpretation permits unfettered discretion to arbitrarily issue barment letters in the first place, and then to selectively prosecute recipients of barment letters.

As noted above, courts generally defer to the military in reviewing challenges to civilian exclusions from closed military installations. *See supra* Part I.B.; *see also United States v. Albertini*, 783 F.2d 1484, 1486 (9th Cir. 1986) ("*Albertini II*"). The military's discretion to exclude civilians from its areas of command is construed so broadly that recipients of

barment letters have no statutory mechanism to directly appeal the letters,[2] nor are they provided notice or an opportunity to be heard before the issuance of the barment letter. *See, e.g., id.* at 1487; *United States v. Jelinski*, 411 F.2d 476, 477 (5th Cir. 1969).

Were this same discretion extended to the public roads outside of closed military installations, base commanders would have virtually unchecked authority to regulate and cite conduct – especially expressive conduct – in public areas. Nothing in the government's expansive reservation of the right to regulate the public roads would prevent the military from issuing barment letters to certain civilians

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[2] The U.S. Air Force's Protest Advisory, Memorandum for the General Public Regarding Limited Permission for Peaceful Protest Activity, and even Respondent's barment order, provide no reference as to how one could directly appeal such an order. App. 52-66. Though defendants who are prosecuted under Section 1382 sometimes challenge their barment orders under the Administrative Procedure Act, *see, e.g., United States v. Mowat*, 582 F.2d 1194, 1199 (9th Cir. 1978), the government's position about the availability and standards for such relief has narrowed. *Compare* Reply Brief for Petitioner, *United States v. Albertini*, 472 U.S. 675 (1985) (No. 83-1624), 1985 WL 669826, at *5 ("The proper way to raise such a challenge is to sue for specific relief under the Administrative Procedure Act, not to ignore the bar order and attempt to litigate the issue of reasonableness in a criminal prosecution.") *with* Brief of Defendant-Appellees at n.4, *Parker v. United States Air Force*, 173 F.3d 861 (9th Cir. 1999) (No. 98-56703), 1999 WL 33653509 ("Although Parker states that he seeks review under the Administrative Procedure Act ("APA") . . . appellees contend that a military officer's barment decision is subject to an even more deferential standard of review than that provided by the APA.").

based solely on the nature of their expressive content. The government has identified no limiting principle within its broad regulations to cabin its exercise of such unfettered discretion.

To the contrary, the government argues that it has the right to chill *repeat* protestors on the public road, whom the base commander has deemed "threats to the base under his command." Pet. Br. 8. Yet a peaceful protest outside of the actual military installation by a dedicated protestor is precisely the type of expressive conduct in a public forum protected by the First Amendment, especially if the repeat protestor is voicing unpopular views even after others have been cowed. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *see also Jenness v. Forbes*, 351 F. Supp. 88, 100 (D. R.I. 1972) (finding military's exclusion of some political candidates to campaign on base while allowing others to do so to be arbitrary and capricious). Whatever discretion is afforded to base commanders to control actual military installations, that same degree of discretion is not acceptable when extended to public roads. *See Greer*, 424 U.S. at 847 (Powell, J., concurring) ("A reasonable place to draw the line is between political activities on military bases and elsewhere.").

This potential for arbitrary enforcement is compounded by the barment process itself. Violations of any military rule or regulation can prompt the issuance of barment letters, which functionally exclude civilians from entire areas. "A debarment is not a trifling matter. It completely cuts off the affected

person's access to the base and results in *de facto* revocation of *all* base privileges. Moreover, a debarment violation is a crime." Major John R. Brancato, USAF, *Base Commander Responses to Civilian Misconduct: Systems & Problems for the Staff Judge Advocate*, 19 A.F. L. Rev. 111, 146-47 (1977) (footnote omitted).

In effect, then, Section 1382 regulates mere *presence* on any public area from which a civilian has been excluded. 18 U.S.C. § 1382 (applying to any person who "reenters or is found within" the definition of a military installation); *see also* App. 98 (government witness testifying that his job at protests was to ask protestors to leave as long as he determined they were "on the ban-and-bar roster"). And that exclusion can be indefinite: nothing prohibits the government from barring civilians from such areas *permanently*, forever stripping them of the right to use those areas. *See* App. 61, ¶ 5 (stating that Mr. Apel's 2007 barment was in effect "***permanently***") (emphasis in original); *see also United States v. Albertini*, 472 U.S. 675, 690 (1985) ("*Albertini I*") (upholding bar order of indefinite duration). This is a further reason why the government's attempt to extend Section 1382 onto a public road is so problematic. Under the government's current interpretation, the government would be permitted to issue barment letters to civilians engaging in protected activity on a public road, for any vaguely articulated – or even pretextual – reason and for any length of time the government sees fit, which automatically excludes

those civilians from accessing the public road, all without any meaningful opportunity to challenge the issuance of such letters.

In addition, the government also seeks to expand the sweep of its *criminal* prosecutorial power over conduct on those public roads. The government seeks broad prosecutorial jurisdiction to criminalize trespass onto public roads where civilians are known to engage in protected conduct, and nothing prevents the use of that power selectively and arbitrarily. Such selective prosecutions, particularly those that target the exercise of protected constitutional rights, are invalid. *Wayte v. United States*, 470 U.S. 598, 609 (1985); *United States v. Crowthers*, 456 F.2d 1074, 1079 (4th Cir. 1972) ("[The government] may not permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy.").

The risk of selective prosecution is highlighted by the government's inconsistent approach to the "designated protest area." On the one hand, the government designated an area specifically for protestors to engage in expressive conduct outside of the closed military base. On the other hand, the government now claims the unfettered discretion to regulate expressive conduct in, and even exclude protestors from, the designated protest area. The government's attempt to have it both ways – simultaneously permitting and chilling speech – should raise serious concerns about the government's ability to safeguard the free speech rights of protestors. And if these concerns exist with

regard to the one area that has been specifically designated for expressive conduct, they multiply when the government seeks to extend its authority to all areas of the public roads and sidewalks outside of the closed base.

B. The government's interpretation permits prosecution of civilians who lack notice that Section 1382 applies to them.

The concern of arbitrary enforcement is especially pronounced given the risk that civilians may be targeted for enforcement even though they lack proper notice of how Section 1382 is applied. Fundamentally underlying one of the key legal issues in this case – whether the United States must have exclusive possessory control over land in order to enforce Section 1382 – is the principle that due process requires civilians to have notice that they are subject to prosecution. *See United States v. Vasarajs*, 908 F.2d 443, 448-49 (9th Cir. 1990) ("'[C]onduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal.' . . . [D]ue process requires that there have been some way for [defendant] to learn the boundary of the Fort.") (quoting 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.1, at 271 (1986)).

While Respondent in this case may have had notice from his barment letter that he would be subject to Section 1382 if found in the protest area,

Section 1382 also contemplates the prosecution of people who go upon the "installation[ ] for any purpose prohibited by law or lawful regulation" – irrespective of whether they have been previously barred or not. 18 U.S.C. § 1382. Therefore, it could apply to first-time protesters. The government's attempt to regulate the public roads outside of the green line demarcating the closed military installation contravenes what civilians reasonably expect (and have come to rely on) in the context of Section 1382: a common-sense understanding of the installation's physical boundaries and the everyday understanding of a public road.

1. The government's sweeping new interpretation contravenes the common-sense understanding of the physical boundaries of the closed military installation.

Civilians who protest on the roadway outside of Vandenberg cannot be faulted for believing they are engaging in permissible speech on a public road – given how the government itself demarcates the installation. A visible green line marks the area designated by the United States for where the public highway ends and the military installation begins. App. 91. On the military side of the road, there are signs, an inner gate, a guard station, and barricades. *Id.* at 79. These markers, along with the green line, are intuitively understood to demarcate the boundaries of the military installation over which the

commander has exclusive control (and, therefore, are within the purview of Section 1382).

Indeed, public opinion confirms that the common-sense understanding is that protestors may not *cross* the green line, which implies that the public side of the green line is consistent with the general understanding of a public area to protest. *See, e.g.*, Adrian Castañeda, *Peace Activists Still Protest Missile Tests*, SANTA BARBARA INDEPENDENT, Mar. 3, 2008, *available at* http://www.independent.com/news/2008/mar/03/peace-activists-still-protest-missile-tests/ ("The crosswalk in front of Vandenberg Air Force Base has an **extra thick painted green line** . . . [that] demarcates the boundary that protestors may not cross.") (emphasis in original); Michael Todd, *Protest. Arrest. Dismiss. Repeat*, PACIFIC STANDARD, Oct. 18, 2012, *available at* http://www.psmag.com/blogs/the-101/protest-arrest-dismiss-repeat-48413/ ("[The protestors] stand on one side of the prominent green line painted across the asphalt near the guard shack, while military police stand on the other."). There are no gates or guards on the public side of the green line that restrict access to the public highway. There is even a "designated protest area" for the public on the public side of the green line. These markers are naturally understood to demarcate areas open to the public for expressive conduct. "[T]he common world" would understand that the military would enforce Section 1382 "if [that] certain line is passed." *See United States v. Bass*, 404 U.S. 336, 348 (1971). And Respondent had not crossed the green line when he was arrested.

Courts upholding prosecutions under Section 1382 have consistently noted the crossing of a clear delineation of military territory. *See, e.g.*, *Vasarajs*, 908 F.2d at 449 ("We hold that the signs posted along the access road leading up to the guard shack adequately announced themselves to Vasarajs as the dividing line between the highway and the Fort."); *United States v. Cottier*, 759 F.2d 760, 762 (9th Cir. 1985) ("The facility is relatively small and enclosed by a chainlink-barbed wire fence."); *United States v. Mowat*, 582 F.2d 1194, 1202 (9th Cir. 1978) ("[T]he Government and the district court note that the Instruction [barring entry] was posted on six to nine signs on the island[.]"); *United States v. Douglass*, 579 F.2d 545, 547 (9th Cir. 1978) ("[T]he boundary of the reservation is well marked by the white line[.]"); *United States v. Floyd*, 477 F.2d 217, 223 (10th Cir. 1973) ("They were warned by the sign, the five security guards, and the fence around the installation.").

And even in close situations – where defendants challenge their convictions because they contend they were on publicly accessible land (despite being on federally owned lands) – courts note the specific indicia demarcating military property that has been trespassed. *Greer*, 424 U.S. at 844 n.1 (Powell, J., concurring) ("Fort Dix, in contrast, is a discrete military training enclave in a predominately rural area."); *United States v. McCoy*, 866 F.2d 826, 829 (6th Cir. 1989) ("[A]fter the [boundary] line had been extended across the driveway, she knowingly stepped to the west of the line [from the public road] in the

course of her leafletting activities."); *United States v. Renkoski*, 644 F. Supp. 1065, 1066 (W.D. Mo. 1986) ("Defendants and others made a ritual entry past the containing rope[.]"); *United States v. Packard*, 236 F. Supp. 585, 586 (N.D. Cal. 1964) ("[T]he areas in question, although outside the perimeter fence . . . are patrolled by the Military Police. . . . [T]here are signs at the entrance to the areas[.]").

Here, however, the government's interpretation would expand the applicable zone for Section 1382 beyond the current markers that clearly delineate areas within the government's exclusive control (*e.g.*, green line, security fence, gateway, checkpoint). *See* App. 93 (government witness testimony that protest site "is in some sort of right-of-way," as readily distinguished from visitor control center "in exclusive jurisdiction"). Civilians should not be subject to prosecution for relying on a common-sense (and, before this case, undisputed) understanding of areas inside and outside of the military's exclusive possessory control. *See, e.g.*, *United States v. Parrilla Bonilla*, 648 F.2d 1373, 1379-83 (1st Cir. 1981) (overturning convictions for trespassing onto military property with an unlawful purpose where there was no signage and insufficient evidence that defendants "reasonably knew their presence was forbidden").

The government's interpretation would allow the government to even criminalize activity in areas which have been designated by it for such activity to take place. When the government asserts the right to regulate the entire stretch of road outside of the

closed military base, keeps that stretch of road open to the public, and then designates a defined portion of that road to be suitable as a "protest area," protestors have a reasonable expectation that they can use that particular area for protected activity. To then cite and prosecute protestors in that area, for engaging in precisely the kind of expressive conduct for which the area is reserved, belies any claim that civilians are truly permitted to engage in protected activity in the designated protest area. At the very least, it creates confusion as to the role of a designated protest area on a public road.

2. The government's sweeping new interpretation undermines the principle of permanent rights granted by an easement.

Not only would ordinary civilians lack notice that their mere presence *outside the green line* of the closed military installation could trigger enforcement under the government's interpretation of Section 1382, the government's interpretation of Section 1382 upends the everyday expectation of the right to be *on a public street*.

Noting that "highways or other public easements often bisect military reservations," Justice Stevens noted in *Albertini I* that "[t]he use of these military lands for the limited public purposes for which they have been set aside does not involve the bold defiance of authority that is foreseen by the structure of the

statute and reflected in its legislative history." 472 U.S. at 698-99 (Stevens, J., dissenting). That is especially the case for public roads, which civilians have historically understood to be safe spaces to engage in protests. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) ("We have repeatedly referred to public streets as the archetype of a traditional public forum, noting that 'time out of mind' public streets and sidewalks have been used for public assembly and debate.") (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

The public's expectation is not diminished in any way simply because the public road is operated subject to an easement that the federal government granted to California. *Cf. Marsh v. Alabama*, 326 U.S. 501, 506 (1946) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."). If anything, the existence of an easement granted to the California public suggests the permanent right to use Pacific Coast Highway, including for traditional purposes like protected speech. *Cf. Pennock v. Dialogue*, 27 U.S. 1, 16 (1829) ("Thus, if a man dedicates a way, or other easement to the public, it is supposed to carry with it a permanent right of user."); *see also* Resp. Br. 14-15.

Here, civilians perceive Pacific Coast Highway as an unrestricted public road to access public sites such as a local school, Surf Beach, and Lompoc. The lack of any signs or other indicia that use of the road is

limited only reaffirms civilian expectations in this regard. The choice to protest on these roads does not hinge on a "bold defiance of authority," but rather an acceptance of the invitation that the government has implicitly extended by leaving the streets to be quintessentially public.

Where all available indications would lead ordinary civilians to believe they are complying with Section 1382 while outside of the visible green line and on a public road, it would be manifestly unfair to prosecute them in those cases. *See generally Lambert v. California*, 355 U.S. 225, 228 (1957) ("[T]he principle [of requiring notice] is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."); *cf. United States v. Gourley*, 502 F.2d 785, 787-88 (10th Cir. 1973) (overturning convictions for illegal reentry where the alleged reentry occurred in places where visitors were encouraged and no restrictions were imposed for access, based on "the realities of the circumstances, and not on a theoretical [basis of whether it is a closed base]").

III. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1382 SHOULD BE REJECTED UNDER THE RULE OF LENITY

The government's argument in this case would permit regulation, exclusion, and prosecution of civilians engaging in expressive conduct on government

property, without limitation, even on a public highway. This new interpretation of Section 1382 bucks the longstanding (and narrower) understanding of the statute that permitted criminalization of conduct only in areas within the exclusive possession of the military. *See Parker*, 651 F.3d at 1183 ("The government acknowledges our section 1382 authority, but challenges its precedential value.").

Respondent demonstrates why traditional principles of statutory interpretation, as well as the legislative history of Section 1382 and its predecessor, clearly support the existing narrow reading of the statute and belies the government's proposed extension of the statute. *See* Resp. Br. 22-23. Because the statutory text does not lend itself to the government's interpretation, and the government has cited no case that has adopted its broad reading of "military installation," the Court should affirm the court of appeals' narrower interpretation of Section 1382.

Even assuming *arguendo* that the Court believes that the government's interpretation has some merit, *amicus curiae* and its members are strong proponents of the principle that courts attempting to interpret criminal statutes should err on the side of caution. Here, the government's interpretation at most raises questions about whether public roads fall within the purview of a "military installation." Neither Congress nor any prior court has resolved these questions with the sweeping answers that the government now advocates. Therefore, even if the Court believes that the government has identified an ambiguity in Section

1382, such an ambiguity should be resolved in favor of Respondent under the doctrine of the rule of lenity.

A. The rule of lenity is applied whenever there is substantial ambiguity as to the application of a criminal statute.

"[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity[.]" *Rewis v. United States*, 401 U.S. 808, 812 (1971). Although the rule of lenity is invoked only after traditional canons of statutory interpretation fail to reveal a definitive construction of a criminal statute, this Court has explained the importance of this doctrine as a safeguard against overcriminalization:

> In various ways over the years, we have stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. . . . [A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Bass, 404 U.S. at 347-50 (internal quotation marks omitted). In addition, this Court has stated:

> This venerable rule not only vindicates the fundamental principle that no civilian should be held accountable for a violation

> of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008) (concluding that, where statute remained coherent and without redundancies under both possible interpretations of an ambiguous term, "[u]nder a long line of our decisions, the tie must go to the defendant").

The rule of lenity does not require the defendant to prove that his is the only possible interpretation of the criminal statute and that the government's interpretation is utterly impossible. *Bell v. United States*, 349 U.S. 81, 83 (1955) ("It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. . . . [However, when] Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."). Even if neither the defendant's nor the government's interpretation is a perfect fit for the statute, the rule of lenity may be invoked as long as the narrower interpretation in favor of the criminal defendant is the "more plausible construction." *Bass*, 404 U.S. at 339-40 (adopting narrower reading in favor of defendant even though both competing interpretations of statutory provision created some redundancy in the statutory scheme and

"the statute does not read well under either view"). In addition, the rule can be invoked where the government's interpretation creates "substantial doubt about the statute's constitutionality." *Id.* at 338.

In cases where there is more than one plausible interpretation of a criminal statute and the issue would be dispositive of criminal liability, the Court should not presume that Congress intended the statute to be applied more broadly than necessary because such a presumption "turns the rule of lenity upside down. [The Court] interpret[s] ambiguous criminal statutes in favor of defendants, not prosecutors." *Santos*, 553 U.S. at 519. Accordingly, the Court's cases often "give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.* at 523 (quoting *Clark v. Martinez*, 543 U.S. 371, 380 (2005)).

B. At most, the government's interpretation of Section 1382 points to an ambiguity in the phrase "military installation," which should be resolved in favor of Respondent under the rule of lenity.

Here, the court of appeals reaffirmed the long-standing interpretation of Section 1382 as requiring proof of the government's "absolute ownership or exclusive right to the possession of the property upon

which the violation occurred." *Parker*, 651 F.3d at 1182. The government argues, however, that there is no "exclusive possession" requirement under Section 1382 because the phrase "military installation" should be construed broadly to cover property in which the military has only partial interest and concurrent jurisdiction. Pet. Br. 12-16.

Respondent amply demonstrates why the court of appeals' interpretation of Section 1382, compelled by longstanding precedent applying the provision only to areas within the exclusive possession and command of the military, is correct. *See* Resp. Br. 22-33. Respondent, however, also argues that the rule of lenity should be applied to the extent that the Court believes there is an ambiguity in Section 1382. *Id.* at 54-55. *Amicus curiae* and its members strongly support the application of the rule of lenity in such cases.

The crux of the government's position is that the "plain language of Section 1382" makes it unlawful to reenter "a military installation within the jurisdiction of the United States," meaning "any place subject to military command." Pet. Br. 10, 12. In particular, the government argues that "nothing in the list of military facilities suggests Congress intended to exempt from coverage the many public roadways running through military installations." *Id.* at 13. Although that statutory list of military facilities does not expressly *exclude* public roadways from coverage under the statute, it also does not *include* public roadways for coverage under the statute. Thus, the government's argument "is a textbook example of begging

the question." *Santos*, 553 U.S. at 515 (rejecting government's circular attempt to advance a statutory purpose based on nothing more than its assumption about the meaning of the contested statutory phrase that was "the very issue in the case").

The government cites no legislative history to show that Congress even considered this issue, let alone that Congress specifically intended for Section 1382 to cover public roadways over which other parties share jurisdiction. It is equally possible (and arguably more likely) that Congress, in listing military facilities where a person "goes upon" such as a "reservation, post, fort, arsenal, yard, station, or installation," simply did not consider public roadways to, through, and from those closed military enclaves to be within the purview of the statute. Absent proof that Congress considered and resolved the question of the application of Section 1382 to public roads in the sweeping fashion that the government now advocates, this Court should not accept the invitation "to speculate regarding a dubious congressional intent." *See Santos*, 553 U.S. at 514-15 ("When interpreting a criminal statute, [the Court does] not play the part of a mindreader."); *see also Bass*, 404 U.S. at 347-50 ("[C]ourts should define criminal activity. This policy embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.") (internal quotation marks omitted).

In advancing its broad interpretation of Section 1382 in this case, the government also argues that

"[n]othing in the statute suggests that Congress limited the authority of military commanders over their installations simply because the United States' property rights may be less than 'absolute' and 'exclusive.'" Pet. Br. 13. That authority, the government asserts, stems from a base commander's "historically unquestioned power . . . summarily to exclude civilians from the area of his command." *Id.* at 2, ¶ 1. Again, this begs the question: Did Congress, with respect to Section 1382, evidence any intent for that historically unquestioned power to extend so broadly that it covers a public road on which civilians like Respondent are peacefully protesting?

The government's generic appeal to that "historically unquestioned power," as well as its warning that any narrow construction of Section 1382 "would threaten substantial harm to the safe and orderly operation of many of this Nation's military installations," amounts to a request that the Court *presume* that Congress intended for Section 1382 to be applied broadly because of military necessity. *See* Pet. Br. 22-26. Any suggestion that the government has a compelling security interest is belied by the fact that (a) the statute classifies violations as merely misdemeanors; (b) the government's broad reading of the statute is relatively recent and, in fact, contravenes positions it has taken in prior litigation; and (c) other courts have concluded that any military interest is minimal in open areas not subject to the exclusive control of the military. *See, e.g.*, *Gourley*, 502 F.2d at 788 (dismissing charges under Section 1382 against

protestors on the ground that "[t]he practical way in which the matter of public entry to the stadium and at the Chapel [on the Air Force Academy] is treated, and the realities thereof," forfeits the government's right to claim a special interest to those areas).

This Court has previously rejected attempts to avoid the rule of lenity and read criminal statutes broadly based on nothing more than generic references to inchoate governmental interests. *See Santos*, 553 U.S. at 514-15 (rejecting governmental claims that defendant's narrower interpretation "hinders effective enforcement of the law" and fails to give the statute "its proper scope"). It should be particularly wary of doing so where the claim of military necessity must be balanced against the right to free speech and assembly. "[T]he First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. Those interests cannot be invoked as a talismanic incantation to support any exercise of power." *Greer*, 424 U.S. at 852-53 (Brennan, J., dissenting) (citation and internal punctuation omitted). Where the government's interpretation of Section 1382 is based more on assumptions than evidence about congressional intent, and at most identifies an ambiguity in what Congress meant by "military installation," the Court should apply the rule of lenity in favor of Respondent.

C. The rule of lenity is particularly important where, as here, civilians may have a more "common-sense" understanding of how a criminal statute is applied and enforced in the real world.

One of the principle justifications for the rule of lenity is that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Bass*, 404 U.S. at 348 (citation omitted). In the context of Section 1382, consideration should be given to "[t]he practical way in which the matter of public entry" to the area in question is treated. *See Gourley*, 502 F.2d at 787-88 (taking into account that military installation did not stop automobiles at entrance gates during football games, did not stop tour buses on the grounds, and provided grounds access to over one million visitors per year).

As noted above, the government's sweeping interpretation of Section 1382 departs from any common-sense understanding of when the criminal statute applies and when it does not apply. *See supra* Part II.B. Even if this is a *possible* interpretation of Section 1382, when a particular reading of a criminal statute is neither intuitive nor established, it raises genuine questions about the fairness and consistency of its application in individual cases. "If

anything, the rule of lenity is an additional reason to remain consistent, lest those subject to the criminal law be misled." *Santos*, 553 U.S. at 523.

In this instance, the public's settled expectations are not only based on common sense, but were also shaped by the actions of the government itself. The government painted the thick green line. It is understood that the government enforces it regulations on the military side of the line. *See supra* Part II.B.1 (citing articles). Its prosecution manual, the U.S. Attorney's Manual, and its Air Force regulations limit the application and enforcement of Section 1382 to areas within the government's exclusive possession and control, *i.e.*, areas "within" the green line at Vandenberg – a position the government has not contravened since the 1970s. *See* Resp. Br. 31-33. This consistent position taken by the government only reinforces the common-sense understanding of the green line by civilians, and exacerbates the lack of notice to civilians who have justifiably relied on that clear green line.

Consistency and certainty not only protect potential protestors at Vandenberg, but also the military itself. To the extent that the government seeks to preserve the military's interest "in deterring repeat harmful conduct in the first instance" (Pet. Br. 8), uncertainty about where and when Section 1382 is applied undercuts the government's professed interest in deterrence. Section 1382 cannot effectively deter civilians who lack a clear understanding about

where they would be violating the law and who reasonably believe they are not violating the law as long as they are peacefully protesting in a designated protest area in a public road over which the government does not have exclusive jurisdiction. At most, Section 1382 would only deter persons who decide to abandon their protests altogether, because they do not want to risk violating any law given its uncertain application. But this kind of "deterrence" scares away civilians who would engage in otherwise peaceful and protected activity on a public road, and is not limited to deterring only "repeat harmful conduct."

Amicus curiae and its members have a long-standing interest in ensuring that criminal statutes are applied consistently, fairly, with ample notice, and in accordance with common-sense understandings of the law. Accordingly, *amicus curiae* respectfully believes that the rule of lenity should be applied, to the extent the Court concludes there is an ambiguity in the scope of Section 1382.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court reject the government's interpretation of Section 1382 and affirm the judgment in favor of Respondent.

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AMICUS CURIAE BRIEF

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UNITED STATES OF AMERICA,
Petitioner,
v.
JOHN DENNIS APEL,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NUCLEAR AGE PEACE FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

Since 1982, the Nuclear Age Peace Foundation ("NAPF") and its supporters have exercised their First Amendment freedoms to advocate for a just and peaceful world that is free of nuclear weapons.

Accordingly, supporters of the Santa Barbara-based NAPF regularly engage in peaceful, lawful protests in the very same protest area in which Respondent John Dennis Apel ("Apel") was cited for violating 18 U.S.C. § 1382 ("Section 1382"). Although it is on a public California highway and within an easement held by the State of California and the County of Santa Barbara, that protest area is also within the concurrent jurisdiction of the Vandenberg Air Force Base ("Vandenberg"), the site of periodic nuclear-capable intercontinental ballistic missile test flights. The location of the protest area, and its proximity to missile test launches, is therefore of vital importance to the NAPF's disarmament message, and its supporters often assemble there just prior to or during the very missile test launches NAPF protests.[2]

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Court's docket confirms that counsel for the parties have executed blanket consents to the filing of *amicus* briefs.

[2] NAPF also regularly disseminates information regarding nuclear-capable missile testing, in general and at Vandenberg. This expressive activity is aimed at its own constituency as well as the public through various media outlets, and seeks an end to nuclear testing at Vandenberg and elsewhere.

As a result, the NAPF has an interest in the continuing application of the full protections of the First Amendment to the road-side public forum where Apel was cited while engaging in peaceful protest. The NAPF respectfully submits that the Court may benefit from the point of view of those who have exercised and wish to continue exercising their First Amendment rights in the location at issue in this appeal.

SUMMARY OF ARGUMENT

This case tests whether the government violates the First Amendment when it prosecutes a citizen for engaging in a peaceful protest along the side of a public highway. Apel was cited for appearing in a protest area on a public highway within the concurrent jurisdiction of Vandenberg after he was barred from that military installation. As a result, although Apel's protest was aimed at Vandenberg's activities, Vandenberg was the one place the government says Apel could not be.

For all the reasons set forth in the Respondent's Brief, the highway in question is a traditional public forum (or at least a designated public forum) and the government's application of Section 1382 to Apel fails to withstand scrutiny. To highlight the important First Amendment concerns implicated in this case, this brief does two things. First, it highlights the important relationship between the location of speech and the message of that speech. Second, it urges the Court to clarify – at the very least – that no *per se* rule prevents the application of traditional public forum doctrine to sites subject to the concurrent jurisdiction of a U.S. military installation in appropriate cases.

1. Criminalizing a protest because it occurs close to the object of the protest distorts the content of the protestor's message. Location is integral to message because the place of a protest is part of the content of the speech that happens there. The link between a speaker's message and where he or she assembles to deliver that message is beyond dispute in this case, where the Vandenberg leadership has itself established a protest area near the gate of the installation, used by individuals who exercise their First Amendment freedoms to protest the tests that occur there. It should be clear to all why the protest area is *there* and not in downtown Santa Barbara, for instance.

Nevertheless, after the government barred Apel from Vandenberg, the public forum near Vandenberg's gate became the one place Apel could not legally assemble to deliver his message, without any regard paid to how important that site is to the content of his protest activity.[3] Thus, enforcing the facially neutral Section 1382 on a public highway near Vandenberg's entrance strains the limits of content neutrality by punishing speech critical of Vandenberg only near Vandenberg.

2. The Court should also disavow any *per se* rule against applying the public forum doctrine to roads found within the concurrent jurisdiction of a military installation. *See United States v. Albertini*,

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[3] Although the government has argued that barring Apel from Vandenberg was supported by the military's security interests, there is no evidence, and no one has argued, that Apel was anything but peaceful and orderly in his protest activities on the occasions he was cited.

472 U.S. 675 (1985); *Greer v. Spock*, 424 U.S. 828 (1976); *Flower v. United States*, 407 U.S. 197 (1972). The government's brief comes close to suggesting that *per se* rule, but such a rule is impossible to square with the Court's holding in *Flower*, which found a public forum within the technical limits of a military installation. 407 U.S. at 198-99. Nor is such a rule required by *Greer* or *Albertini*, both of which upheld restrictions on speech within military installations, but stopped short of announcing that a public forum can never exist where the military has concurrent jurisdiction.

Moreover, given the prevalence of public easements running through military installations across the nation, *see Albertini*, 472 U.S. at 698 (Stevens, J., dissenting), any rule that categorically removes those spaces from the public forum doctrine would drastically disrupt the reasonable free speech expectations of the untold numbers of people who travel those rights-of-way every day. Thus, the Court should clarify and confirm that a public forum can exist within the jurisdiction of a military installation where the particular site at issue otherwise meets the well-settled tests for identifying a public forum, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), and where the facts support the conclusion that "the military has abandoned any claim that it has special interests" in regulating who speaks in the forum, *Flower*, 407 U.S. at 198.

ARGUMENT

I. CRIMINALIZING PROTEST UPON A PUBLIC FORUM IN CLOSE PROXIMITY TO THE OBJECT OF THE PROTEST DISTORTS THE CONTENT OF THE PROTESTOR'S MESSAGE

The First Amendment's free speech clause protects expression and engenders a marketplace of ideas by mandating that "the government may not prohibit all communicative activity" in archetypal traditional public fora, and by requiring that content-based exclusions in those fora withstand strict scrutiny to be enforceable. *Perry*, 460 U.S. at 45. Indeed, "'[s]treets are natural and proper places for the dissemination of information and opinion.'" *Flower*, 407 U.S. at 198 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). However, in order to make a particular point, disseminate a precise message, or communicate a specific opinion, not every street is as good as any other. Location is integral to the message conveyed.

The importance of location to a protest's message is not reasonably disputable on the facts presented in this case. The very fact that Vandenberg has a protest area within its jurisdictional boundaries reveals that even Vandenberg's leadership agrees that assembling near the base's gate means something different than a protest in downtown Santa Barbara, for instance. Otherwise, it is hard to imagine why the protest area, which was established by the government's settlement of a 1989 litigation, would be found within Vandenberg's jurisdiction at

all. (*See Fahrner v. Oliverio*, CV 88-05627-AWT(Bx), C.A. E.R. 7, 50-53.)[4]

Thus, applying the facially neutral Section 1382 to exclude a protestor from a zone established *in a particular spot* for just such expressive assembly strains the limits of content neutrality. As scholar Timothy Zick has observed, "[i]n terms of communicative behavior, place is as critical to expressive experience as voice, sight, and auditory function. . . . Speech, however, does not occur in the abstract, in spaces. If it did, it would make no difference to the speaker where she was when she delivered her message. Speakers, however, often fight for access to specific places because speech *there* is qualitatively and quantitatively different from speech *elsewhere*." Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 Geo. Wash. L. Rev. 439, 460 (2006) (emphasis added). Indeed, myriad familiar examples demonstrate the relationship between place and content: sit-ins at segregated schools and restaurants, protests at fertility clinics, demonstrations about gay rights in front of the Court or and animal cruelty demonstrations in front of stores that sell fur clothing. *See Galvin v. Hay*, 374 F.3d 739, 749 (9th Cir. 2004) ("In common experience, speakers rely upon location to inform the content of their speech."). Removing a peaceful protestor from a par-

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[4] Although the location of a particular public street makes a significant difference in the content of messages communicated in the forum, that location should not typically affect whether the traditional public forum test applies. "No particularized inquiry into the precise nature of a specific street is necessary," because streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988).

ticular public forum when he or she has chosen that forum precisely for its location has a debate-altering effect and distorts the marketplace of ideas. *See Hill v. Colorado*, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting) ("By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination. The Court ought to so acknowledge. Clever content-based restrictions are no less offensive than censoring on the basis of content.").

Here, after Apel was barred from all spaces within the jurisdiction of Vandenberg, it became illegal for him to peacefully assemble along Highway 1, no matter how important the location of his protest activity to his message. By requiring Apel to protest the testing that happens *at Vandenberg* only very f*ar from Vandenberg itself*, the government distorted the permissible content of his message and interfered with the marketplace of ideas. His choice of protest forum was not random, and neither is the choice of that forum by others who have something to say about what happens on Vandenberg; the location of that protest activity is part of the message of the protest itself.

In sum, for those similarly situated to Apel, including supporters of NAPF, the right to protest in Vandenberg's protest zone is crucial to what they say about nuclear-capable missile testing at Vandenberg. Indeed, the long tradition of assembly and protest by those who favor nuclear disarmament depends on the ability to make statements in particular places, where the message and the location go hand in hand. And, because U.S. nuclear weapons policy is not routinely up for a popular vote, peaceful assembly near military installations is an effective way for those in

favor of disarmament to have their voices heard. If the government can apply Section 1382 to protests on public streets unrestrained by the strict scrutiny that would apply to any other public street, the effect will be distortion of the debate, a hindrance to the marketplace of ideas, and a damper on the public conversation about U.S. nuclear policy.

II. THE COURT SHOULD CLARIFY THAT A PUBLIC FORUM CAN EXIST WITHIN THE JURISDICTIONAL LIMITS OF A MILITARY INSTALLATION

The Government comes dangerously close to suggesting a *per se* rule against applying public forum analysis to land within the jurisdictional limits of a military installation. (Br. of Pet. 27.) Such a rule cannot be squared with even the narrowest interpretation of *Flower*, and is not required by the Court's other military installation cases, *Greer* and *Albertini*. Moreover, given the prevalence of public easements across military installations nationwide, *see Albertini*, 472 U.S. at 698 (Stevens, J., dissenting), categorically removing the whole of every military installation's jurisdiction from the traditional or designated public forum doctrines would precipitously disrupt the public's reasonable expectations about their free speech rights while traveling public rights-of-way. *See id.* The Court should therefore clarify and confirm that a public forum can exist within the legal limits of a military installation where the particular site at issue otherwise meets the well-settled tests for identifying a public forum, *see Perry*, 460 U.S. at 45-46, and where the facts support the conclusion that "the military has abandoned any claim that it has special interests" in regulating who speaks in the forum, *Flower*, 407 U.S. at 198.

The Court's *per curiam* decision in *Flower* reversed the Section 1382 conviction of a leafletter arrested on New Braunfels Avenue within the limits of Fort Sam Houston in San Antonio. 407 U.S. at 197. In doing so, the Court identified the familiar authority holding that "'streets are natural and proper places for the dissemination of information and opinion,'" *id.* at 198 (quoting *Schneider*, 308 U.S. at 163), which undergirds this Court's foundational explanation of the public forum doctrine, *see Perry*, 460 U.S. at 45 (citing *Schneider*). The Court treated New Braunfels Avenue as it would "any public street" after finding that no sentry guarded the well-used and important traffic artery, from which the fort commander had chosen not to exclude the public. *Flower*, 407 U.S. at 198. "Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue," leaving the Court to apply the First Amendment to a public street as it would in any other case. *Id.* No *per se* rule was established as regards military installations.

Nor does *Greer* require such a rule. In *Greer*, the Court upheld regulations governing the military installation at Fort Dix, New Jersey against a First Amendment challenge. 424 U.S. at 838. There, however, the individuals who were denied access to the installation to distribute campaign literature "d[id] not contend[]that the Fort Dix authorities had abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates within the confines of the military reservation." *Id.* at 837. On the contrary, the record established that the federal government exercised exclusive jurisdic-

tion over the state and county roads running through Fort Dix, upon which military police could and did "stop civilians and ask them the reason for their presence." *Id.* at 830.

The Court stopped short of establishing a *per se* rule against applying the public forum doctrine to all land within a military installation's jurisdiction; otherwise, it would have overruled *Flower*. Instead, the Court rejected the opposite *per se* rule – "that the respondents *could not be prevented* from entering Fort Dix for the purpose of making political speeches or distributing leaflets" – as the Third Circuit had held. *Greer*. 424 U.S. at 834-35 (emphasis added); *see also id.* at 836 (criticizing the Third Circuit for "announcing a new principle of constitutional law . . . that *whenever* members of the public are permitted freely to visit a place owned or operated by the Government then that place becomes a 'public forum' for purposes of the First Amendment.") (emphasis added).

In *Albertini*, the Court again rejected the notion that *all* publicly accessible military bases are public fora, but stopped short of holding that such spaces can *never* contain a public forum simply because the forum is within the legal jurisdiction of the installation. 472 U.S. at 686 (holding only that "[m]ilitary bases *generally* are not public fora") (emphasis added). The Court explained that, after *Greer*, "*Flower* must be viewed as an application of established First Amendment doctrine concerning expressive activity that takes place in a municipality's open streets, sidewalks, and parks." 472 U.S. at 684-85. In other words, once the facts establish that "a portion of a military base constitutes a public forum because the military has abandoned any right to ex-

clude civilian traffic and any claim of special interest in regulating expression," the First Amendment applies on the military installation just as it would on any other street or park. *Id.* at 685-86.

The Court's application of the First Amendment to this case should at the very least clarify that no *per se* rule prevents the public forum doctrine from applying to land within the jurisdictional boundaries of a military installation. As noted, permitting such a *per se* rule would instantly disrupt the settled expectations of those using public rights-of-way all across the country. For instance, in his dissent from *Albertini*, Justice Stevens noted that "a substantial portion of the main runway at Honolulu International Airport lies inside the boundaries of Hickam Air Force Base" and "highways or other public easements often bisect military reservations," as is the case here. 472 U.S. at 698 (Stevens, J., dissenting). In fact, the public easement crossing Vandenberg carries an untold number of Californians to the Surf Beach Amtrak station nestled between Vandenberg and the Pacific Ocean. (*See* Gov't C.A. Br. 4-5.) Across from the main gate of Vandenberg, there is a public middle school, and nearby is a public bus stop and visitors' center. (C.A. E.R. 8; J.A. 79.) A *per se* rule altering the application of the First Amendment to people traveling these routes is unnecessary and out of step with the careful avoidance of categorical holdings exhibited in *Flower*, *Greer*, and *Albertini*.

CONCLUSION

This Court should affirm the Ninth Circuit's decision on the grounds that Mr. Apel's convictions violate the First Amendment.

Dated: October 28, 2013

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DENNIS APEL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TEN NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici, described in Appendix A, are The Reporters Committee for Freedom of the Press and ten of the nation's leading news organizations – Advance Publications, Inc., Media Law Resource Center, The National Press Club, the National Press Photographers Association, National Public Radio, Inc., the Newspaper Guild – CWA, the Online News Association, the Radio Television Digital News Association, the Society of Professional Journalists, and the Student Press Law Center.

Amici are advocates for the rights of news media and others who seek to provide information to the public about important issues that affect them, and thus have a strong interest in ensuring that speech in public fora receives the highest level of First Amendment protection. Any restriction on speech in streets, parks, and sidewalks – which have, since "time out of mind," been held for use by the public to assemble, communicate, and discuss public questions, must be consistent with the First Amendment. Although the government may control the use of its own property for speech much as a private landowner, this power is not unbounded and is subject to constitutional constraints.

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[1] Both parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

In this case, respondent John Apel was convicted for peacefully exercising his First Amendment rights in a designated protest area created by Vandenberg Air Force Base just outside its main gate, within an easement held by the State of California and the City of Santa Barbara. The government charged three violations of 18 U.S.C. § 1382, which prohibits anyone from reentering a military installation after previously being removed and ordered not to return. When the alleged violations occurred, Apel was protesting in public space expressly set aside for free expression, and that was not under the Base's exclusive control. Apel was convicted over objections that the First Amendment bars enforcing Section 1382 in the Vandenberg designated protest area. Apel reasserted his First Amendment rights on appeal, but the Ninth Circuit reversed the convictions on grounds that the government lacks exclusive possessory rights over the Vandenberg protest area.

Although the present dispute arises in the context of access near military installations, it raises the underlying issue of when the government may restrict access to public areas notwithstanding statutory or First Amendment considerations. This is a question of substantial concern to the press. For example, journalists have had difficulty gaining access to areas near courthouses in order to report news, despite the fact that such areas generally permit public access.[2] And the press repeatedly has

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[2] *See, e.g., Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir. 1970); *Arkansas Democrat-Gazette v. Zimmerman*, 20 S.W.3d 301 (Ark. 2000).

been forced to reassert the right to exit poll in public fora like sidewalks and byways around voting precincts.[3]

This case was decided by the court below on statutory grounds, but that decision cannot be disturbed without running headlong into the underlying First Amendment issues. Accordingly, if the Court were to find that the respondent may be barred from Vandenberg Air Force Base pursuant to Section 1382, *Amici* respectfully ask the Court to uphold the decision below under the First Amendment. *Amici* submit that the government cannot be allowed to punish speakers for engaging in peaceful activities at places specifically designated for such endeavors. In this particular context, *Amici* seek to underscore the importance of not affording military authorities unilateral control over property that has been designated as public fora.

BACKGROUND

Respondent John Apel was convicted of violating 18 U.S.C. § 1382 for peaceably protesting on a public highway outside Vandenberg Air Force Base, within a designated protest area outside the Base's main gate. *See* Resp. Br. 1-5 (citing record). Section 1382 is a trespassing regulation governing military installations, making it unlawful for any person, having previously been removed and commanded not

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[3] *See, e.g., American Broad. Cos. v. Wells*, 669 F. Supp. 2d 483 (D.N.J. 2009); *American Broad. Cos. v. Heller*, No. 2:06-CV-01268, 2006 WL 3149365 (D. Nev. Nov. 1, 2006); *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988).

to return under a "barment order," to later reenter the property. Apel had received two barment orders for Vandenberg, for conduct occurring within the Base proper, prior to the time of his protests giving rise to this case. *Id.* 5.

Unlike many cases arising under Section 1382 and involving the actual grounds of a military bas0065 and/or appurtenances that are clearly part of a base, the property in this case lies outside Vandenberg's main gate, on land long designated for public use. Specifically, Vandenberg's legal bounds encompass a public road, Highway 1, also known as "Pacific Coast Highway," that is used by the public to travel to and from a wide variety of locations well beyond Vandenberg, having nothing to do with the Base.

Since 1962, the State of California and Santa Barbara County have held an easement over the portion of Highway 1 that overlaps Vandenberg. The right-of-way is under concurrent jurisdiction of the state and county, which, along with military police, have law enforcement authority over the area. There are no gates or sentries to control entry into the area of the easement. Traffic flows freely along Highway 1 without restrictions, except for traffic lights.

And, since 1989, outside Vandenberg's main gate, within the Highway 1 easement and along the road-way, a specific area has been set aside for purposes of allowing peaceful protest activity. This "designated protest area" is bounded by Highway 1, Lompoc-Casmalia Road, and a painted green line

across California Boulevard that connects with roads at the intersection outside Vandenberg's main gate. There is a public bus stop inside the designated area.

On three dates in 2010, one each in January, March, and April, Apel traveled to and entered the designated protest area within the easement, to engage in peaceful expression protected by the First Amendment. Each time, Apel was cited for violating Section 1382, escorted from the area, and released. Apel moved to dismiss all three counts, arguing that the government could not constitutionally enforce Section 1382 against him, as the easement renders that portion of Highway 1 and the designated protest area public property over which the United States lacks exclusive possession. Resp. Br. 5. The trial court rejected the constitutional defense, and convicted Apel. The Ninth Circuit reversed, holding that Section 1382 applies only to areas over which the United States can claim an exclusive right of possession.

SUMMARY OF ARGUMENT

The First Amendment precludes applying Section 1382 to allow the government to punish peaceful expression on property over which the military lacks exclusive control and that, more fundamentally, is specifically designated as a public forum. Apel was prosecuted for engaging in protected speech at a designated protest area that, along with the adjoining roadway, lies in an easement that Vandenberg Air Force Base ceded to the State of California and Santa Barbara County. This makes the thoroughfare and protest area no different from other streets

or parks that are among the archetypical public fora in which the First Amendment strictly limits the government's ability to regulate speech.

While the government's power to regulate the use of its property is perhaps greatest on military bases which are not traditionally public fora, that authority is diminished where the property at issue is a public thoroughfare or similar public space. When the military abandons control of part of its property such that that portion becomes indistinguishable from a public park or street, as it did in this case, it forfeits any claim of a special interest in limiting expressive activity there. Nothing in this Court's jurisprudence hints that the mere proximity of *other* military property, which may not be a public forum, alters the equation.

Section 1382 also cannot be enforced against Apel as he was in an area *designated* as a public forum. As a consequence, any regulation of his speech must satisfy strict scrutiny. Whatever may have been the basis for Apel's prior barment orders, he was cited for exercising free speech rights in a public forum *outside* the military's exclusive control. It is difficult to imagine any government interest in selectively keeping him out of a public space open to all citizens for expressive purposes. Accordingly, Apel's convictions cannot be upheld, regardless of how the Court resolves the statutory question in this case.

ARGUMENT

Although this case was decided below on statutory grounds, it also raises the question whether

military authorities may use an anti-trespass law to limit activities that unquestionably are protected by the First Amendment. This Court may affirm the decision below on that basis. *E.g.*, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Of course, if the Court rejects the Ninth Circuit's reading of Section 1382, it must rule on the constitutional question if it is to uphold the conviction, or at least remand the case with instructions to rule on the First Amendment issue. *Accord* Gov't Br. 27. Any such constitutional ruling must adhere to the Court's public forum jurisprudence.

I. Section 1382 Cannot Be Enforced in an Easement Designated For Public Use

Although the government is empowered to control the use of its own property, streets, parks, and sidewalks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Such space occupies a "special position in terms of First Amendment protection." *United States v. Grace*, 461 U.S. 171, 180 (1983). Indeed, this Court repeatedly has referred to public streets "as the archetype of a traditional public forum," noting that for "'[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). *See also Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011).

The government's ability to regulate the use of its property is at its zenith on military bases, which are not traditionally used as public forums. *Greer v. Spock*, 424 U.S. 828 (1976). But this principle loses its force where the property under military control is used as a public thoroughfare. *Flower v. United States*, 407 U.S. 197 (1972). In such circumstances, where the military opts "not to exclude the public from the street," it "abandon[s] any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue." *Id.* at 198. The same should have held true here, where Vandenberg has ceded, or at least shares, control over the relevant portion of Highway 1, and affirmatively dedicated a designated protest zone to the public for expressive activity.

This Court has long recognized that the public retains strong free speech rights in venturing onto public streets and other areas that historically have been used for purposes of assembly and discussing public questions. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). To safeguard this freedom, the government is strictly limited in its ability to regulate private speech in such traditional public fora. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). And when the government creates "a designated public forum" by intentionally opening to the public government property not traditionally open as a public forum – as with the area where Apel was cited – any restriction on speech must withstand the same strict scrutiny as restrictions in a traditional public forum. *Id.*

Nothing in this Court's jurisprudence suggests that mere proximity of *other* government property, which may not be a public forum, alters that protection. Thus, the fact that government may constitutionally limit the use of property *near* a public thoroughfare does not empower it to restrict speech on the thoroughfare *itself*. *Grace*, 461 U.S. at 171. That remains true even if the proximate public property is a military installation to which Section 1382 may apply. *See, e.g.*, *Flower*, 407 U.S. at 197-98.

This Court's decision in *United States v. Albertini*, 472 U.S. 675 (1985), is not to the contrary. Gov't Br. 27. In *Albertini*, the Court held only that hosting an open house on a military base did not *create* a designated public forum so as to permit holding a demonstration. 472 U.S. at 686. The government tries to apply that holding to these facts, but it does not fit. Gov't Br. 27. *Albertini* expressly distinguished its facts from a situation where "the military so completely abandon[s] control that the base became indistinguishable from a public street[.]" 472 U.S. at 686. Unlike the situation in *Albertini*, the property at issue in this case *is* indistinguishable from a public street both because it includes the designated protest area and because Vandenberg ceded control of the area to state and local governments for use as a public thoroughfare. *Albertini* accordingly does not address the issue of the speech – or its location – that is in question here.

II. Section 1382 Cannot Be Enforced in a Designated Public Forum

Regardless of whether the section of Highway 1 encompassed by Vandenberg may be considered a traditional public forum, Section 1382 cannot be enforced in this case because Apel was within an area set aside as a public forum. While the government is under no obligation to designate its property as a public forum, when it does so, it is subject to the same constitutional constraints that apply in a traditional public forum. *Supra* 8 (citing *Cornelius*, 473 U.S. at 800). *See also Perry*, 460 U.S. at 45-46. In either case, speech in such fora receives the highest level of First Amendment protection, such that content- or speaker-based restrictions are upheld only if they satisfy strict scrutiny. *Boos v. Barry*, 485 U.S. 312 (1988); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

In most cases involving speech on military bases, a central question is whether the government's actions to permit access for certain types of speech create a forum. *See, e.g., Albertini*, 472 U.S. 675; *Greer*, 424 U.S. 828. But that is not the issue in this case. Here, there is no dispute about the fact that Apel was arrested in an area that for over two decades has been specifically designated as a forum for speech. No permission was required for members of the public to freely use the space for purposes of expression, and no physical or other barriers indicated that the space was part of a military base or impeded speech within the protest area.

In these circumstances, the citations issued to Apel and his convictions violate the First Amendment. Whatever may have been the basis for his previous barment orders, he was cited in this case for the exercise of free speech rights in a designated public forum *outside* the military's exclusive control.

The decisions below do not address whether applying Section 1382 in this manner can satisfy strict scrutiny. The district court refused to honor the designated protest area as a public forum of any kind. Even if this Court holds the military's lack of exclusive control over the portions of Vandenberg subject to easement does not bar applying Section 1382, the government still must show that excluding barment order recipients from Vandenberg's designated protest area is narrowly tailored to serve a compelling state interest. *E.g.*, *Boos*, 485 U.S. at 334. It is hard to envision how keeping a barment order recipient out of public space that is open to any citizen for expressive purposes serves *any* government interest, let alone a compelling one. It is equally difficult to envision how Apel's convictions can be upheld, regardless how the Court resolves the statutory question.

CONCLUSION

For the foregoing reasons, this Court should uphold the Ninth Circuit. If it does not do so on the same bases as that court, the Court should hold that the military may not exclude those engaged in peaceful protest activities in a traditional or designated public forum unless it is necessary to serve a

compelling interest using the least restrictive means. In the alternative, it should remand the case for the Court of Appeals to address the constitutional issue in the first instance.

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APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper

Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information

interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center ("SPLC") is a non-profit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

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AMICUS CURIAE BRIEF

No. 12-1038

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN DENNIS APEL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether it violates the First Amendment for a person who was previously barred from a military installation to be convicted under 18 U.S.C. §1382 for peacefully protesting on a fully open public street, which has been designated as a public protest area, outside the closed military installation.
2. Whether a person who was previously barred from a military installation may be convicted under 18 U.S.C. §1382 for peacefully protesting on a public roadway easement outside the closed military installation.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).[2] One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the constitutional right of citizens to engage in freedom of speech, expression, and assembly in the nation's public spaces.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of *amicus* briefs on behalf of either or neither party.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for Rutherford Institute as *Amicus Curiae*).

SUMMARY OF THE ARGUMENT

In the instant case, this Court is confronted with a very narrow question that lends itself to an intuitive answer. At issue is whether a military debarment order can be used to completely prohibit speech that would otherwise be protected under the First Amendment on land that is owned by the federal government, but is subject to a right of way easement that has been held by the state and county for open and unrestricted public travel. Respondent Denis Apel was convicted of violating 18 U.S.C. § 1382, which prohibits "reentry" into a military installation by an individual who has previously received an order barring entry to that installation. Resp't Br. 19. However, the location where Mr. Apel is alleged to have "reentered" military land is on a stretch of public highway on California State Highway 1 that is subject to an unrestricted right of way easement originally held by the state of California, and since relinquished to the county of Santa Barbara. Resp't Br. 12-13. Further, it is uncontested that primary law enforcement authority over the area resides with the State and County. Resp't Br. 2; Joint Appendix ("J.A.") 40; Court of Appeals Excerpts of Record ("C.A.E.R.") 8, 167.

Citing 18 U.S.C. § 1382, Mr. Apel was arrested on the pubic side of a roadway, outside of the confines of the closed military installation, around 100 yards from a public middle school. Resp't Br. 1-2. At the time of his arrest, Mr. Apel was fully within the designated protest zone, and was engaging in protected protest speech activities. Resp't Br. 9. In justifying his arrest, the government argued that despite the unrestricted

easement, it retained the right to enforce the debarment order against Mr. Apel, claiming the land to be part of the military installation subject to the debarment order. *Id.*

This Court should affirm the Ninth Circuit's reversal of Mr. Apel's convictions, and find that Vandenberg Air Force Base's debarment order did not apply to the protected speech activities engaged in by Mr. Apel. In addition to the guiding precedent from *Flower v. United States*, 407 U.S. 197 (1972), well-covered by Respondent, broader constitutional concerns counsel in favor of affirming the Ninth Circuit's *per curiam* opinion applying the "exclusive control and ownership" test adopted in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011).

The federal government is, by far, the single largest landowner in the United States.[3] Considering the breathtaking amount of property that the United States government now owns, failing to adopt an "exclusive control and ownership" standard in the application of § 1382 and similar criminal statutory provisions would create far too much uncertainty about the status of important constitutional rights on millions of acres of government property. Given this, it is essential that this Court require that the government establish a degree of control and use over land that is greater than mere ownership before it can deprive private citizens of essential constitutional rights.

Further, because debarment orders are issued on a fully discretionary basis by the installation

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[3] U.S. Congressional Research Service. Federal Land Ownership: Overview and Data. (R42346, February 8, 2012) at 1.

commanders, a contrary ruling by this Court would grant installation commanders virtually limitless discretion in restricting speech and other protected activities outside of the physical confines of a closed base – a result surely not intended when § 1382 was enacted.

Finally, applying the same logic used for justifying the restriction of constitutionally protected rights under § 1382, the broad language of the government's chosen interpretation of the statute could open the door to similar restrictions on government owned properties other than military installations.

ARGUMENT

A. This Court Should Interpret § 1382 To Require "Exclusive Possession And Control" Of The Government Land For The Application Of Criminal Sanctions For Violation Of A Debarment Order

The federal government currently owns 640 million acres of land, or approximately 28% of the total land in the United States. U.S. Congressional Research Service. Federal Land Ownership: Overview and Data. (R42346, February 8, 2012) at 1. Within that number, the Department of Defense manages over 19 million of those acres for military bases and training ranges alone. *Id.*

Adopting the government's chosen interpretation of § 1382 would instantly turn these millions of acres of property – even those portions that are abandoned, subject to easements, undeveloped, or inarguably serve no sensitive military purpose – into no-man's-lands, where a single government official is vested with the unchallengeable authority to define constitutional rights by fiat.

Given this, it is essential that a restrictive standard be applied to determine which government properties are properly of the type where important constitutional rights can be unilaterally deprived, and which are not. In *Parker*, implicitly applying this Court's logic in *United States v. Flower*, 651 F.3d 1182 (1972), its own previous holdings, and the government's understanding of the law (as determined by both the Air Force and United States Attorneys' Manuals), the Ninth Circuit held that the appropriate test for establishing when important constitutional rights could be deprived under § 1382 turned on whether or not the government maintained exclusive ownership and control over the properties. This Court should adopt that determination and affirm the Ninth Circuit's holdings in *Parker* and *Apel* below.

i. Existing Restrictions On Constitutional Rights Within The Military Context

It is beyond dispute that installation commanders face a special set of challenges in properly managing and securing sensitive government lands. Within the domain of closed military installations, commanders are granted a great deal of leeway in restricting the speech and conduct of military and non-military personnel within the commander's control, often in instances that would otherwise be considered violative of their constitutional rights.

In *United States v. Jenkins,* 986 F.2d 76, 78 (4th Cir. 1993), the Fourth Circuit found that it was well established that searches on closed military bases "have long been exempt from the usual Fourth Amendment requirement of probable cause." In *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), this Court dismissed a Free Exercise challenge to an Air Force regulation that prevented an Orthodox Jewish rabbi from wearing a yarmulke with his uniform, finding that "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." And in *Parker v. Levy*, 417 U.S. 733 (1974), this Court upheld a court martial finding against an army officer in the face of a First Amendment vagueness challenge, stating that "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Similar such examples are myriad.

In a similar vein, § 1382 is meant to serve as a tool that allows commanders the flexibility to determine on a case-by-case basis the level of protection necessary to adequately secure their

sensitive assets. As the government forcefully argues and Respondent concedes, the Constitution can tolerate such limitations within the property of the closed military bases as specifically necessary for properly protecting sensitive government assets. Pet'r Br. 25.

However, broadening the scope of coverage to include civilian activity outside of the physical confines of installations would result in a restriction of protected rights that the constitution cannot bear. Despite the cited cases above allowing for severe restrictions on constitutional rights while within military installations, there is little doubt that the attempt to apply analogous restrictions against civilians outside of the military installation would be declared unconstitutional. The government would not contend, for example, that the Fourth Amendment probable cause standard for searches of vehicles driving along Highway 1 could be eliminated simply by virtue of the government's ownership of the property, nor would it argue that the Free Exercise rights of students at Vandenberg Middle School, or on the nearby beach could be restricted in a similar manner.[4]

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[4] *See* Brief for Respondents, noting that the middle school is "[d]irectly across from Vandenberg's main gate entrance, on the shoulder of Highway 1 and on federally owned land." Resp't Br. 19, 39 citing C.A.E.R. 8; J.A. 64, 93.

B. The Government's Broad Interpretation Of § 1832 Provides No Limiting Principle And Would Empower Installation Commanders With Unlimited Discretion In Restricting Protected Speech In Violation Of The First Amendment

In the civilian context, this Court has consistently cautioned about the dangers of vesting the right of unbridled discretion in the hands of government officials, especially with respect to First Amendment rights. In *City of Houston, Tex. v. Hill*, 482 U.S. 451, 455-465 n.15 (1987), this Court struck down a statute that made it illegal to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty," cautioning that it gave too much discretion to "policemen, prosecutors, and juries to pursue their personal predilections," and "the moment-to-moment judgment[s]" of when to and when not to pursue prosecution.

In the instant case, a similar concern exists with respect to the discretionary authority of commanders to both issue debarment orders and to enforce existing debarment orders. Although some interpretive guidelines exist, the decision to issue a debarment order against civilians by an installation commander is solely within the discretion of the installation commander. *United States v. Albertini*, 783 F.2d 1484, 1487 (1986). Further, each installation commander is granted the power to debar only for her own installation. 32 C.F.R. § 809a.2(b) *et seq*. This combination of factors allows

for the potential of varying degrees of protection of constitutional rights, based solely on the personal proclivities of individual installation commanders. As a practical reality, the types of activities considered to warrant debarment in one military installation will not receive the same treatment at another.

Of particular concern to this Court in cases like *Hill* is the fact that such unilateral, unconstrained decision-making authority often leads to the targeted suppression of minority viewpoints. This concern about the targeted suppression of certain viewpoints is of particular relevance here, where installation commanders may be unfamiliar with the special considerations unique to civilian populations.

While such inconsistency may be tolerable within the physical confines of military installations for the reasons discussed above, the same justifications cannot support the varied treatment of the core First Amendment rights of civilians outside the walls of military installations.

Furthermore, the fact that commanders know that their decisions to debar are unreviewable enhances the danger that installation commanders might exploit the power to debar as a way to limit dissent in fora in a manner unintended by § 1382, and repugnant to the Constitution. Indeed, the very purpose of the "protest zone" set up in the instant case was to satisfy the terms of a lawsuit settlement requiring that the government maintain protected speech activity in this public space. Resp't Br. 21.

Because these protest zones remain relatively rare, they can be hotbeds of political debate and

discussion, and can draw a great deal of public attention or media coverage. If, as the government contends, by maintaining the right to issue unreviewable debarment orders, it can also bar protesters from engaging in expressive activities in these areas, then § 1382 would give the government vast power to unilaterally shape the terms of debate in these zones. Instead of representing truly free zones of speech and ideas, installment commanders would be able to suppress competing or controversial views, just by applying their debarment powers.

Additionally, there is no reason to believe that if the government's preferred interpretation of § 1382 is granted, the suppression of constitutionally protected rights would be limited only to debarment orders, or only to military bases. Broadly interpreted, the government's understanding of its power to seek criminal sanctions under § 1382 could be applied to restrict constitutional rights in any circumstance where the government maintains any possessory right over a piece of property – even in instances where the government has abandoned any right to otherwise restrict access to that property. *Flower*, 407 U.S. 198. Indeed, the government's continued emphasis on the requirement in § 1382 that the property merely be "within the jurisdiction of the United States" in order for it to apply criminal liability under the statute does not instill any confidence on this point.

C. This Court Treats The Application Of Military Regulations That Deprive Private Civilians Of Important Constitutional Rights With Particular Caution, Even *Within* The Boundaries Of Military Installations

Further, even with regard to the rights of civilians *on* military installations, this Court affords civilians certain rights that members of the military are not afforded. In *Reid v. Covert*, 354 U.S. 1, 4 (1957), this Court considered a request for a habeas corpus petition by a woman accused of murdering her service-member husband abroad, on military base property. Attempting to try her by a military court-martial tribunal, the government invoked Article 2(11) of the Uniform Code of Military Justice, which purported to subject all persons "serving with, employed, or accompanying the armed forces" to the court-martial provisions of the UMCJ. *Id.* at 42 n.1. Declaring Article 2(11) unconstitutional, this Court opined on the necessity of adequately ensuring the Fifth and Sixth Amendment rights of civilians, in contrast to the comparatively fewer protections available for servicemen in the same circumstances. *Id.* at 21. *See also Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960) (dismissing the court-martial trial of the dependent wife of a soldier, who lived on base housing, for a non-capital offense, on the grounds that she was "protected by the specific provisions of Article III and the Fifth and Sixth Amendments," and that her prosecution was thus "not constitutionally permissible).

These cases demonstrate the seriousness with which this Court is willing to treat the summary suspension of the constitutional rights of civilians, even for conduct within the confines of military installations.

CONCLUSION

For the reasons set forth above, *Amicus* respectfully asks this Court to affirm the Ninth Circuit's decision below, reversing Mr. Apel's convictions, and formally adopting the "exclusive possession and control" requirement for lawful convictions under § 1382.

Respectfully submitted,

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